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JUSTICE BEHIND THE WALLS— A STUDY OF THE DISCIPLINARY PROCESS IN A CANADIAN PENITENTIARY †

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The Canadian prison, an integral part of the criminal justice system, has so far not been seen as the concern of lawyers and the courts. It has been left to the sociologists to study its particular culture¹ and to penologists to study its effectiveness as a crime prevention tool.² Even though interest has been directed to low visibility areas such as the role of the prosecutor³ and

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I would like to express my thanks to Ms. Marguerite Jackson, a former student of mine, who acted as my research assistant for this study. The field work was our joint effort. I would also express appreciation to the staff and inmates at Matsqui Institution for their cooperation. Particular thanks are due to Mr. Doug McGregor, the Superintendent of the Institution. I hope that the hard criticism I have directed at his handling of discipline in this article is not interpreted as in any way to doubt his integrity. We simply disagree fundamentally on how the disciplinary process should be approached in the prison.

¹ See e.g. W. E. Mann, *Society Behind Bars: A Sociological Scrutiny of Guelph Reformatory* (Toronto: Social Science Publishers, 1967).

² See e.g. Brian C. Murphy, *A Quantitative Test of the Effectiveness of an Experimental Treatment Program for Delinquent Opiate Addicts* (Ottawa: Information Canada, 1972).

³ B.A. Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969).

the values and behaviour of the sentencing judge,⁴ the prison has remained immune from critical analysis of its relations to the larger criminal justice system. While the immunity is explicable as a reflection of the indifference the larger society pays to its most oppressed groups,⁵ the result has been that the prison, which has the greatest impact on freedom, has been left to develop its own policies and procedures about the way it deals with deprivation of that freedom without having to conform to standards and procedures which are designed to ensure that decisions about freedom are principled and fair, and without the scrutiny and interference from the profession which is designed to ensure that such standards and procedures are respected. This state of affairs has led two commentators to refer to the prison as a lawless agency.⁶

In this study I have looked at one aspect of the prison — the internal disciplinary process — and have sought to assess its relationship to the larger criminal justice system. This area was chosen since it represents the private criminal law of the prison in that it is a process of social control in substantive and procedural terms and therefore permits comparison with the larger public system. Like the larger system, the disciplinary system in the prison seeks to define the limits of behaviour which will be accepted without official intervention, sets out procedures for processing those who are suspected of violating those limits and prescribes sanctions for those who are convicted of violations.

In comparing the private system of the prison and the larger system of criminal justice, I have sought to identify differences, whether of principle or process, and evaluate those differences in light of the overall goals of the criminal law, the particular goals of corrections and the exigencies of prison administration. My dominant concern has been to see if prison justice is a fair system, and if not, how it can be made fair. In pursuing this inquiry I have not only drawn on the traditional model of due process as a model for criticism and reform, but have also considered whether alternative models

⁴J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press in Association with the Centre of Criminology, University of Toronto, 1971).

⁵An indifference which is based on what Phillip Slater has aptly named the "Toilet Assumption".

Our ideas about institutionalizing the aged, psychotic, retarded, and infirm are based on a pattern of thought that we might call the Toilet Assumption — the notion that unwanted matter, unwanted difficulties, unwanted complexities and obstacles will disappear if they are removed from our immediate field of vision. We do not connect the trash we throw from the car window with the trash in our streets, and we assume that replacing old buildings with new expensive ones will alleviate poverty in the slums. We throw the aged and psychotic into institutional holes where they cannot be seen. Our approach to social problems is to decrease their visibility: out of sight, out of mind. This is the real foundation of racial segregation, especially its most extreme case, the Indian "reservation." The result of our social efforts has been to remove the underlying problems of our society farther and farther from daily experience and daily consciousness, and hence to decrease, in the mass of the population, the knowledge, skill, resources, and motivation necessary to deal with them.

P.E. Slater, *The Pursuit of Loneliness* (Boston: Beacon Press, 1970), at 15.

⁶David Greenberg and Fay Stander, *The Prison as a Lawless Agency* (1972), Buff. L. Rev. 799.

to those on which the larger system of criminal justice is based can be developed which are more responsive to the special problems of the prison.

The field work for the study took place during the summer of 1972 at Matsqui Institution, a federal penitentiary in British Columbia. While Matsqui was originally opened in 1966 as a specialized institution for drug offenders, since 1968 it has been a medium security institution with a full range of federal inmates. The heavy emphasis on "treatment" developed in the early years still pervades the institutional philosophy, so that an underlying part of my analysis encompasses a study of the rehabilitative ideal at Matsqui.

The field work itself assumed the following form. My research assistant and I analysed the records of all cases disposed of by Matsqui's "Warden's Court", officially known as the Inmate Disciplinary Board, over the years 1968-72; we attended all sessions of Warden's Court from May through August together with meetings of the Inmate Training Board, the Earned Remission Board, and Grading Board; we attended several group counselling sessions, we interviewed inmates, guards, counsellors, and administrative staff;⁷ we participated in a number of meetings between the Inmate Committee⁸ and counselling staff and in a meeting with senior administration on institutional policy. In short I was given and exercised the greatest possible freedom in talking to whom I wanted and observing what I thought was relevant to this study.

In the year that has elapsed between the empirical research and the final writing of this analysis a number of important changes have taken place at Matsqui. In the latter part of the article, I have tried to frame the discussion in terms of these changes so that the analysis, like Matsqui, has a dynamic range and moves with the institution it seeks to describe and monitor.

Part I The Private Criminal Code of the Prison

Ascertaining the limits of acceptable conduct in a federal penitentiary is a more difficult task than the mere perusal of the Criminal Code. The difficulty derives from the structure of the rule making power in the penitentiary system. Section 29(1) of the Penitentiary Act⁹ provides:

The Governor-in-Council may make regulations

- (a) for the organization, training, discipline, efficiency, administration and good government of the Service;

⁷ Most of the interviewing was done in the main cell block, where, two or three times a week, we would spend the whole evening. We had offered to try and help inmates with their legal problems and this occupied most of our time. Frequently, the conversation came round to our research and the interviewee's experience with and views on disciplinary proceedings. The writer also gave several talks on legal matters of concern to the inmates. At a more personal level the writer had formed friendships with people in the institution before starting the research and developed others during the research. The many hours spent in discussions of prison life have helped to put the more formal aspects of the study in perspective.

⁸ The inmate committee is an elected group of inmates who deal officially with the administration on certain stated matters.

⁹ R.S.C. 1970, c. P. 6.

- (b) for the custody, treatment, training, employment and discipline of inmates; and
- (c) generally for carrying into effect the purposes and provisions of this Act

Pursuant to this section, Section 2.29 of the Penitentiary Regulations¹⁰ provides:

Every inmate commits a disciplinary offence who

- (a) disobeys or fails to obey a lawful order of a penitentiary officer;
- (b) assaults or threatens to assault another person;
- (c) refuses to work or fails to work to the best of his ability;
- (d) leaves his work without permission;
- (e) damages government property or the property of another person;
- (f) wilfully wastes food;
- (g) is indecent, disrespectful or threatening in his actions, language or writing towards any other person;
- (h) wilfully disobeys or fails to obey any regulation or rule governing the conduct of inmates;
- (i) has contraband in his possession;
- (j) deals in contraband with any other person;
- (k) does any act that is calculated to prejudice the discipline or good order of the institution;
- (l) does any act with intent to escape or to assist another inmate to escape;
- (m) gives or offers a bribe or reward to any person for any purpose;
- (n) contravenes any rule, regulation or directive made under the Act; or
- (o) attempts to do anything mentioned in paragraphs (a) to (n).

The regulations are however only the first layer of the rule-making structure. Section 29(3) of the Act provides that the Commissioners of Penitentiaries may issue Directives

. . . for the organization, training, discipline, efficiency, administration, and good government of the service and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries.

Pursuant to Section 29(3) the Commissioner has issued and continues to issue a constant stream of Directives which are supplemented by Divisional Instructions which seek to amplify what is contained in the Directives. While an inmate is bound by Directives (section 2.29 (n) of the Regulations makes it in offence to contravene a Directive) it has been judicially determined that the Directives and Divisional Instructions do not have the force of law (as do the Regulations) and, therefore, there is no duty owed by a member of the Penitentiary Service to an inmate to adhere to the Directives.¹¹

There is yet a further layer of rule-making power in the form of Standing Orders. Penitentiary Regulation 1.15 provides "that an institutional head may, under the authority of the Commissioner, issue Standing Orders which shall include all orders that are peculiar to his institution". At Matsqui, Standing Orders consist of a large file of approximately 200 pages. A Standing Order becomes, at the date of its publication, a rule of the institution

¹⁰ The Penitentiary Service Regulations 1962, S.O.R./62-90.

¹¹ *R. v. Institutional Head of Beaver Creek Correctional Camp ex parte McCaud* (1969), 2 D.L.R. (3d) 545.

and a lawful order and instruction of the Warden¹² and again Section 2.29 (h) and (n) makes it an offence for an inmate to contravene or disobey a Standing Order.

Thus, in the Penitentiary, it is through Directives, Divisional Instructions and Standing Orders that the standards of acceptable behaviour are set out and these standards are incorporated by reference into the definition of an offence under section 2.29. How are inmates given notice of the standards? The Divisional Instructions state that "the inmate will be informed of the kind of behaviour and acts which are unacceptable and considered offences under Regulation 2.29¹³ and Commissioner's Directive 1.15 specifically provides that the Institutional Head shall make available in the library a copy of all Directives pertaining to the conduct and training of inmates.¹⁴ However, it also provides that Divisional Instructions, being issued for the information of institutional staff, are *not* to be made available to inmates. Likewise, the foreword to the Matsqui Standing Orders states:

Inmates shall not under any circumstances, be permitted to have access to Standing Orders. Officers shall not discuss Standing Orders within the hearing of inmates. This does not preclude officers quoting to an inmate Standing Orders pertaining to inmates.¹⁵

Since it is in Divisional Instructions and Standing Orders that the details of penitentiary life are worked out, the denial of inmate access to such of these documents that affect their duties, rights and responsibilities is remarkable. To make the matter worse during the period of this study there were no copies of Directives affecting inmates on file in the library, notwithstanding the express wording of C.D. 1.15.

How then do inmates receive notice of the prison's private criminal code? No information is given at Matsqui as to what constitutes an offence under the Penitentiary Regulations during the orientation sessions which each inmate is given during his first week at the institution. This is partly premised on the fact that such information has already been given while the inmate was at the B.C. Penitentiary where the inmate will necessarily have been some time prior to his transfer to Matsqui.¹⁶ This information is contained in a booklet given all newly convicted federal prisoners during their orientation at the B.C. Penitentiary. In this booklet there is a section which reproduces parts of the Commissioner's Directive concerning discipline, including the list of offences and the procedures for dealing with them. There is also in other parts of the booklet a statement of many of the rules and regulations of the institution, breaches of which constitute an offence. Since the present study did not look at the disciplinary process in the B.C.

¹² Standing Orders of Matsqui Institution, Forward para. 4 dated 1 March, 1966 (hereafter call "Standing Orders").

¹³ Divisional Instruction (D.I.) 300.01 para. 3, dated 4th April, 1972.

¹⁴ Commissioner's Directive (C.D.) 1.15.

¹⁵ Standing Orders. Forward para. 11.

¹⁶ All persons sentenced to a penitentiary term in British Columbia are at first sent to the B.C. Penitentiary. Since this is a maximum security institution, an inmate will be transferred to Matsqui or one of the other institutions in the Federal System, if he is classified as not needing maximum security.

Penitentiary, it is not possible to say to what extent the booklet includes all the rules and regulations of that institution. In any event the regime at Matsqui is markedly different from that at the Penitentiary¹⁷ and it can not therefore be simply assumed that there is an equivalence of those rules and regulations. Also the booklet does not go into what are acts calculated to offend against good order and discipline and, without notice of this, in addition to the operative rules and regulations of Matsqui, it is difficult for a new inmate at Matsqui to have such advance notice of acceptable limits of behaviour at the institution. In fact, it seemed to be the expectation of penitentiary staff at Matsqui that inmates would learn the limits of acceptable conduct incorporated through Sections (h) and (k) of the Disciplinary Code as they went along and/or that they all knew what the limits were because of their prior prison experience.

A lawyer looking at the open-ended nature of some of the subsections of section 2.29 might be expected to criticize them on the basis that in the regular criminal law it is regarded as an important principle that offences be defined with precision in advance of punishment, a principle usually referred to as the principle of legality. In order to understand whether such a principle should have vitality in the prison setting we need to inquire into its rationale. That rationale has been stated in this way:

This is the basic meaning of "justice" in criminal cases. One who believes that criminals should be dealt with "justly" believes, among other things, that punishments can be inflicted on criminals without great danger of revolt or rebellion, providing sufficient advance notice is given in the form of rules. Especially in the Western societies with long traditions of barring *ex post facto* legislation, elaborate systems for warning citizens that nonconformity of certain kinds will have punishment as its consequence stimulate rather docile acceptance of official punishments when they are in fact ordered by the courts and executed by prison officials and others. In other words, conformity can be maximized only if the punitive system has a rational base. If punishments were imposed irrationally or capriciously, the citizen would be unable to determine to which rules he should conform. Moreover, the infliction of punishments in an apparently arbitrary way would be viewed as "unjust" and would, then, contribute to divisiveness in the society.

An important function of the criminal law, so far as maintaining consent of the governed is concerned, is providing the "advance notice" necessary for justice. The carefully-stated and precisely-stated prohibitions stipulated in criminal laws give advance notice that wrongdoers will be punished, thus contributing to the maintenance of the consent of the governed even when the latter are punished.¹⁸

If it is true that the principle of legality is a minimum requirement for legitimation of authority it can be argued that it has particular importance in the prison context. The prison population (and particularly the penitentiary population) is one characterized by a general lack of respect for authority and it has always been one of the proclaimed purposes of prison officials to

¹⁷ This is not only because Matsqui is medium as opposed to maximum security but also because it is a modern open structure compared to the fortress-like B.C. Penitentiary. See *infra* for more detailed description of the difference in the two regimes.

¹⁸ D. R. Cressey, *The Functions and Structures of Criminal Syndicates*, in The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime (Washington: U.S. Gov't Printing Office, 1967) at 45-47.

change that attitude and instill respect. The rationale for the principle of legality as discussed above suggests that a system of discipline, where those subject to authority are not given adequate notice of what conduct they are expected to conform to, is likely to further alienate and reinforce inmates' view of authority as illegitimate.

The thrust of the concept of legality is not however simply to ensure that people are entitled to know what they are forbidden to do, so they may shape their conduct accordingly. Equally important, it is designed to prevent abuses of official discretion.¹⁹ The real vice of vague statutes or regulations is that they permit those charged with enforcement to use their own judgment to decide what is within and what is outside the limits of the vague law. Such vagueness often invites an exercise of discretion to charge or not to charge based not on the quality of the act itself but on considerations having to do with the enforcer's particular values, idiosyncrasies and prejudices.

The President's Commission on Law Enforcement, in talking of police discretion conferred by the vagueness of the vagrancy laws, had this to say of the costs of such vagueness:

. . . it constitutes an abandonment of the basic principle upon which the whole system of criminal justice and the democratic community rests, close control over the exercise of authority delegated to officials to employ force and coercion. This control is to be found in carefully defined laws and in judicial and administrative accountability. The looseness of the laws constitutes a charter of authority on the street whenever the police deem it desirable. The practical costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to be the object of these laws the idea that law enforcement is not a regularized authoritative procedure but largely a matter of arbitrary behaviour by the authorities.²⁰

It is submitted that the vice of vagueness involves significant costs in the prison system. The sense of oppression and alienation from authority which the arbitrary exercise of discretion generates is one of the dominant features of the prison experience as related by inmates. This is referable to the fact that prisoners have very little control over their own lives; decisions such as where they live, what they wear, what they eat, and to a large extent what work they engage in are decisions which they do not make. Prisoners are aware therefore that in major areas affecting their lives they are dependant upon the authorities. Living with that reality, to then find that the small area of their life that is not subject to obvious control is, however, susceptible to intervention by the authorities through the vehicle of vague disciplinary offense, as interpreted by individual guards, reinforces the sense of oppression.

The need for notice and precision in defining the limits of acceptable behaviour in the prison context is not based simply on a lawyer's analogical reasoning but represents a basic prisoner demand. This can be seen clearly from a meeting we attended between inmates and counsellors to discuss the

¹⁹ See H. L. Packer, *The Limits of the Criminal Sanction* (Stanford, Cal.: Stanford University Press, 1968) at 88.

²⁰ President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Courts* (Washington: U.S. Gov't Printing Office, 1967) at 107.

results of a questionnaire circulated to all inmates asking their views on their counsellors and the service they provided. Part of the meeting was devoted to inmate criticism of the counsellors' failure to articulate a written statement of the objectives of the counselling program and what inmates were supposed to do to get its benefits. As related by the inmate representatives, many inmates felt that this lack of any written statement meant that counsellors were able to exercise extreme manipulation of inmates by constantly changing the unwritten rules of the counselling "game". The counsellors were extremely reluctant to agree to this request for a written statement of the counselling program, largely because the program is premised on the individualized treatment model and therefore, even though it takes place in a group setting, its objectives are to be related to the individual participants and their particular problems. To the counsellors, therefore, relying upon the rhetoric of the treatment model, the inmates' criticisms and demands completely missed the point. The inmates, on the other hand, were responding to their perception of the reality that the individualized treatment model was a myth, since each counsellor had a caseload of fifty inmates with whom he met once a week, and that the program was really designed to manipulate and control the behaviour of inmates to ensure greater compliance with prison regulations. Since they therefore viewed it as another more sophisticated system of behaviour control they demanded that they know the rules of the system. Put in another way, inmates are prepared to view counselling as a game prison administrators play, and while they do not regard it as a particularly pleasant or helpful game, they are prepared to play it so long as the game has some rules and those rules cannot be unilaterally changed from time to time by one side without reference to, or the acceptance of, the other side. Irrespective of whether the inmates' perception of the reality of the counselling program at Matsqui is accurate,²¹ what is inescapable is the inmates' demand that any regime which seeks to regulate their behaviour, be it labelled "disciplinary" or "therapeutic", must meet minimal standards of advance notice and specificity of standards if it is to be accepted as legitimate.

While it has been suggested that the principle of legality is as relevant to the framing of prison rules as it is to the framing of the rules of the criminal law outside prison, are there other considerations, referable to the nature of prisons and exigencies of prison administration, which would limit its application in prison? In a recent U.S. decision²² where the problem of vagueness in institutional regulations was raised, the court identified the following considerations:

1. Life is complex in prison and all forms of misbehaviour cannot be anticipated. Some may go unpunished for want of a rule.

²¹ The inmates' perception is, however, supported by other more objective commentators on the individualised treatment model of corrections. See e.g. *Struggle for Justice, A Report on Crime and Punishment in America* (New York: Hill & Wang, 1971).

²² *Landman v. Royster* 333 F. Supp. 621 (1971). In this case the Court held that a prison disciplinary offense of "misconduct" or "misbehaviour" was too vague, and penalties based on such allegations violated the due process of law clause of the 14th Amendment of the U.S. Constitution.

2. Legalistic wrangling over whether a rule was broken may visibly undermine the administration's position of total authority necessary for security's sake.
3. Prisoners, unlike free men, must well know that they are considered potentially dangerous men and must expect to be highly regimented. In such cases the law requires less in the way of notice and places a greater burden on the individual to make enquiry or seek permission before acting.²³

This first consideration is very similar to that which led the House of Lords in *Shaw v. D.P.P.*²⁴ to confirm that the English courts had a residual power, through the crime of conspiracy to corrupt public morals, to deal with the gaps in the criminal law which "will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society."²⁵ While it is possible to meet this argument on the basis that the cost of permitting such an open-ended system, in terms of undermining the individual's sense of security, outweigh the benefit that may come from being able to take action against conduct which is not defined as a disciplinary offence, but which ought, on reflection, to be an offence, there is the further point that prison life is much more routine than life on the outside and therefore it ought to be less difficult to establish in advance reasonably clear rules as to the limits of acceptable behaviour, leaving little margin for un-anticipated misbehaviour.

The second and third considerations can be considered together since they both flow from the view that security and efficiency are primary values in the prison system.²⁶ A similar value preference also characterizes the traditional military system where automatic obedience by lower ranks to superior orders has always been demanded in order to achieve an efficient disciplined organization.²⁷ What is often overlooked, however, by those who have this value preference in the prisons and who look to the military model to justify it, is that the military exists primarily to protect the security of the country: it does not exist to reshape the lives of soldiers in order to make them better citizens when they leave the ranks. The modern prison, however, exists not just to protect the security of the country, but also to make prisoners better citizens when they leave the prison. Prison rules and procedures cannot therefore be based simply on what is the most efficient way of regulating prison life and maintaining security, but must take into account the need to legitimate authority so that inmates, when they once again become free citizens, have a greater respect for authority in the larger society.

The custody considerations enumerated above are capable of being assessed in terms of the actual operation of Matsqui Institution. Since in our research we analyzed all offences dealt with by the Disciplinary Board since 1968, it is possible to see how essential the more open-ended offence cate-

²³ Id. at 655.

²⁴ [1969] 2 All E.R. 446.

²⁵ Id. at 452.

²⁶ These rules correspond to what Packer characterises as crime control values in the larger criminal justice system, see Paikes, *supra*, note 19, Part II.

²⁷ For an account of how this value system affects military justice see R. Sherrill, *Military Justice is to Justice as Military Music is to Music* (New York: Harper's Row, 1970).

gories were to the handling of discipline. The most open-ended offence under section 2.29 is sub-section (k) which provides that an inmate commits a disciplinary offence when he "does any act that is calculated to prejudice the discipline and good order of the institution." This is clearly designed to be the "catchall" provision to deal with acts which are not covered by other offences and reflects the perceived need to be able to deal with unanticipated forms of deviance. In the four years the research covered we found that this offence made up 14%, 26%, 16%, 11% and 7% of all offences for the respective years 1968, '69, '70, '71, '72. Apart from the jump from 1968 to 1969, it has clearly been of declining importance. Of course, even at its current low of 7%, it could still be of significance depending upon the kinds of acts which are made the subject of the charge. We therefore analyzed all cases coming under subsection (k) and discovered that the great majority of the acts in fact constituted some other offence and the charge could properly have been laid under that other section. In the five years, out of 185 charges laid under this subsection only the following seemed to be ones which did not constitute some other offence: giving false information about a visit; fraudulently obtaining a canteen order; forcing into the meal line; having a plastic bag containing urine; being under influence of an unknown substance; sniffing lacquer thinner; inflicting wounds on self; appearing unsteady on feet. These totalled about 25 charges out of the 185 charges laid under subsection (k). It would clearly not strain the ingenuity of a draftsman to catch those offences involving fraud by making it an offence to knowingly give false information to institutional staff concerning visits, correspondence and canteen supplies and other matters where the staff are dependent upon inmates for the accuracy of information. The charges laid under (k) arising out of self-inflicted wounds clearly do not deal with unanticipated conduct. Such occurrences are not at all unknown in the prison setting. The fact that these are not dealt with as a separate offence may suggest that the penitentiary authorities intended such occurrences to be dealt with other than as disciplinary matters. If this is so, laying charges under (k) undermines such a policy. Of the remaining incidents which were made the subject of (k) proceedings several indicate very clearly the vice of vagueness and the kind of discretion it gives to officials. Thus, using (k) to support allegations of "being under the influence of an unknown substance" and "appearing unsteady" enabled prison authorities to take disciplinary action against individuals suspected of using drugs without resorting to the normal proof of a positive urine analysis.

The only examples of all the charges brought under (k) which deal with what might be called unanticipated misconduct are the charges arising out of glue sniffing and the one case where an inmate was charged with having a bag containing urine, which presumably was going to be used in lieu of any urine sample he might be asked to give. It would certainly appear from the rarity of these unanticipated incidents that the maintenance of a (k)-type of offence is not even marginally related to the maintenance of order within the institution. Indeed, in relation to the incident involving the attempt to skew the urine analysis, the administration had successfully avoided this becoming a problem by requiring all urine samples to be given in the full view of a custody officer. Also as to the other novel kind of

misconduct, the glue sniffing, the administration can again respond by passing a Standing Order prohibiting the practice and can frame that in such a way as to cover not only glue but other similar substances.

Although subsection (k) is clearly designed as the grabbag of the Disciplinary Code it is in fact subsection (h), which makes it an offence to wilfully disobey or fail to obey any regulation or rule governing the conduct of inmates, that throughout the period of study accounted for most charges — 24%. This subsection incorporates by reference all regulations and rules governing inmates, whether they appear in the form of Penitentiary Regulations, Commissioner's Directives or Matsqui Standing Orders.²⁸ In analyzing this offence and others generally arising at Matsqui, my focus will be changed from just a concern with vagueness and, consistent with the analytic model of comparing the larger criminal law process to the private prison one, I will also consider whether there is justification for a system which makes it an offence to do in prison that which would not be an offence on the street.

This may seem at first a rather naive inquiry since clearly prison is very different from the street! It is a closed community of people who are not there by choice, who are in constant contact with each other under very confined conditions, and who do not take kindly to the fact of their confinement. Thus it might seem that clearly there must be special rules governing their conduct which inevitably will be more restrictive of behaviour than street restrictions in the form of the criminal law. To test this requires an analysis of the actual offences which constitute the code of discipline in prison, to see whether those which include non-criminal conduct are properly justified by the particular circumstances of prison life or the goals of the correctional process.

By far the most common occasion for disciplinary action in Matsqui over the five year period studied was violation of the rules requiring inmates to "stand to" for the count and prohibiting an inmate from going into another inmate's cell. The first rule is based on the obvious need to count the population and to ensure that the person counted is a living inmate and not a dummy. Many inmates expressed complaints that the number of counts was excessive for a medium-security institution and the requirement of actually standing in front of the cell to be counted was a constant reminder of the depersonalization of prison. While this may be so, it is difficult to

²⁸ The following list of charges brought under subsection (h) indicates the range of regulations and rules involved: failed to stand to for count (under Standing Orders every inmate is required to come out of his cell and stand by the door for four of the five daily counts); entered another inmate's cell; violated the conditions of a temporary absence pass; brought soccer boots into the living unit (the living unit is the penitentiary term for the main cell block); late for work; failed to report for work; failed to cooperate in taking urine sample; used drugs; talked to inmates in special correctional unit (SCU is the segregation wing of the prison); failed to keep cell clean; improperly dressed; did not shave; did not wear name tag; smoked in dining room; had diet food in another inmate's cell; loitered; went "fishing" in SCU (this refers to the practice of using a piece of wire to push through the cell window to transfer or receive something to the next cell); made an unauthorized phone call; did not attend counselling group; worked on hobby during regular working hours; played Monopoly during working hours; smoked in kitchen; went to an unauthorized area of the prison without a pass; failed to report for early lock-up.

challenge the institution's need to be sure that it is indeed the inmate who is being counted and the "stand to" rule therefore seems based on legitimate security concerns.

The other rule which is commonly the subject of disciplinary action is the prohibition against two inmates in one cell. The original reason for this rule seems to be linked to minimizing homosexual activity in prison; yet very few of the custody officers who we interviewed seemed to think that this was the rationale at the present time. Their view was based on contradictory assumptions; in the one case many guards felt that such conduct was relatively rare in Matsqui due to temporary absences and a much more liberal visiting policy than at most institutions.²⁹ Others felt that if the men wanted to engage in homosexuality there were many places where such activity could take place other than in the cell, primarily in the shower rooms to which the men had access at all times when they were on the tier and not locked in their cell. Certainly on either basis the homosexual prevention device seems a doubtful justification for the one in a cell rule. Other possible justifications, based on the need to prevent inmates from dealing in narcotics or other contraband, seem equally difficult to maintain given the other opportunities inmates have to engage in such activities during the day when they are not in the living unit and given the general freedom of movement they have within the institution. It is particularly interesting to note that when the women's unit was in existence at Matsqui, the Standing Orders permitted a woman inmate to visit another woman inmate in her cell provided that the door was open and the lights were on. Whether the reason for the different rules was based upon a false assumption about the difference between male and female sexuality, the women's rule is a reasonable balance between the security interest in monitoring inmates' behaviour and the inmate's interest in preserving some zone of privacy in being able to communicate with another inmate other than during hours of work or across the dining hall floor. The inability of many guards to give a good reason for the rule suggests that there is no good reason and that the rule is an example of the administration's perceived need to exercise control over inmates' lives, even though that control has no positive value from the correctional point of view and indeed has very negative effects, since inmates rightly resent arbitrary authority and meaningless infringements on their already severely limited right to privacy.³⁰

The rules we have discussed so far — of not "standing to" for the count and two in a cell — are clearly rules of behaviour which are peculiar to the prison situation. However, there are rules enforced at Matsqui which have a fairly close equivalence with standards of required behaviour on the street, yet which are enforced at Matsqui through sanctions which have no such equivalence. Perhaps the best example of this are the rules relating to

²⁹ Visiting at Matsqui usually takes place in an open area where men can be together with women.

³⁰ For a probing analysis into the assault on privacy in the prison see B. Schwartz, *Deprivation as a "Functional Prerequisite": The Case of the Prison* (1972), J.A.L. Crim. and Police Sc. 229.

work. Section 2.25(1) of the Penitentiary Service Regulations requires that "every inmate is required to work at an occupational activity that is calculated to assist in his reformation and rehabilitation". Matsqui Standing Orders further require that "each inmate shall be required, as far as it is possible, to work eight hours per day".³¹ Under section 2.29(c) it is an offence for an inmate to refuse to work or to work to the best of his ability. During the period of our research, inmates, in addition to being charged under 2.29(c), were also charged under 2.29(h) for failing to report for work or being late for work.

The prison rules concerning work parallel street standards to the extent that they are both premised on the puritan work ethic, whereby work is seen as inherently necessary for the development of man and society and as such is to be encouraged and rewarded. Conversely those who do not work are to be penalized. However the two systems use different methods of reward and punishment. On the street the rewards take the form of money wages within the framework of a consumer society, and the punishments take the form of public welfare, involving money payments at little more than bare subsistence levels administered in a dehumanizing dignity-depriving manner. Compare this with the prison system. At first glance its reward system seems to parallel the street. Thus, under the Penitentiary Service Regulations it is provided that

The Commissioner may . . . authorise rates of pay for inmates, which rates shall be designed to encourage them to become better citizens upon release from custody and, in particular, to

- (a) provide greater incentive to inmate workers;
- (b) encourage inmates to accumulate reasonable financial reserves for the day of their release;
- (c) motivate inmates to work constructively and apply themselves to learning trade skills; and
- (d) prepare inmates for employment in free society in line with the requirements of that society.³²

Consistent with these Regulations, the Commissioner's Directives set out rates of pay which vary with the status or grade of the inmate and these gradings depend for a large part upon matters connected with the inmate's work performance. At Matsqui there are four grades varying from one to four which carry differential rates of pay. The rates start at 55 cents per day for a grade one inmate, and can rise by 10 cent increments to 85 cents per day for a grade four inmate. There is a breakdown of inmates' earnings into what is called a spending portion which can be used for purchases from the inmate canteen and a compulsory savings portion which can only be used for specific authorized purposes.³³

It should be fairly clear from these rates of pay and the marginal increases from grade to grade, that money is not the stimulator or incentive which it purports to be on the street. It is at this point that the rationale for

³¹ Standing Orders para. 3.2.

³² 1962, S.O.R./62-90, S.2.26.

³³ C.D. 325, June 1, 1964.

the additional stimulator of the prison system — punishment for refusal to work or failure to arrive at work on time — becomes evident. On the outside this kind of behaviour is likely to be followed by a loss of economic rewards, either in the form of losing one's job or having pay deducted. In the prison system loss of job is less available as a sanction and the rates of pay are so low that they cannot possibly function as stimulators for the desired behaviour patterns; so in substitution for the economic rewards of the street the prison institution uses that commodity it has most readily available — legal coercion. Thus it is in the prison system that, ultimately, force is used instead of money to ensure compliance with the puritan work ethic.

It seems clear that this substitution of force for money is not effective in developing positive attitudes towards and respect for the value of lawful work. Penitentiary officials continually complain that inmates are less diligent and less productive than street workers. Yet this is hardly surprising.³⁴ Why should we expect inmates to show interest in their assigned jobs or diligence in learning necessary skills, without adequate money compensation to provide opportunities to experience the rewards of work, in the form of buying goods and services society has to offer. It is no real objection that in the prison system the rewards of the street are of limited use, since much of this limitation is part of the existing system, which for example issues inmates drab uniforms rather than permitting them to buy their own clothes. In any event, even under the existing system the inmates could, if they were adequately compensated for work, buy goods and services for their families or save for their future release.

However, it is not just that the present system does not stimulate good work habits or provide inmates with opportunities to appreciate the value of work; the present system also has the potential for reinforcing whatever negative feelings inmates may have about lawful work. It is becoming clearer and clearer in our assembly line technological society that much of the work people engage in is dehumanizing, boring and alienating. In fact, to many people the only thing which makes it bearable is the money it brings and the uses to which the money can be put. As Charles Reich has put it:

Work and living has become more and more pointless and empty. There is no lack of meaningful projects that cry out to be done, but one's working days are used up in work that lacks meaning, making useless or harmful products or servicing the bureaucratic structures. For most [North] Americans work is mindless, exhausting, boring, servile and hateful, something to be endured while "life" is confined to "time off".³⁵

In the prison system not only are the conditions under which men engage in work even more dehumanizing and alienating than the street, but in the prison, we withhold that which makes it bearable on the street. Thus inmates can see work, meaning the kinds of work opportunities realistically open to

³⁴ For a detailed economic explanation of the low productivity of inmates see N. Singer, *Incentives and the Use of Prison Labour* (1973), 19 *Crime and Delinquency* 200.

³⁵ Charles Reich, *The Greening of America* (New York: Random House, 1970) at 9.

them, in its true light without the mask of money. It would be difficult to imagine a better way to reinforce the notion that lawful street work is to be avoided in favour of alternatives that permit a sense of identity, the development of initiative and a sense of independence from "the man". Unfortunately it seems to be an unquestioned assumption of prison administrators that the opportunities they offer inmates in the form of vocational training are preferable to those which inmates may have had to date. While this may be true for some, there are a significant number of inmates who do not see it this way for good reason. There is a literature which suggests that a criminal life style may be for many the only available life style which permits opportunities for the development of identity and initiative, the avoidance of repetitive tasks, a sense of being one's own man or woman, especially for those parts of the community who, because of their socio-economic position, are precluded from legitimate work opportunities which have these qualities.³⁶

Some light on this problem is thrown by developments at Matsqui in the Related Training Program, which seeks to make community placements of inmates through the temporary absence program. Because of the background of the staff member administering the program during the period of this research, many of these placements were made in very different work situations than those traditionally sought for inmates. In particular, inmates were placed in projects involving the development of community services, a welfare rights organization, a pre-school for retarded children, and a program for dealing with people going through crisis situations. Many of the projects were funded by Opportunities for Youth or by the Local Initiatives Program and had the common characteristic that people in the projects were involved in the designing of the project, to satisfy both their own interests and some community need and had responsibility in implementing and assessing the project. In other words, these projects permitted the individuals participating to have a good deal of initiative in the project and a sense of responsibility for it being carried out. They also have in common that they are legitimate and within the framework of the law. They thus offer inmates a model for a non-criminal and yet "non-straight" lifestyle.

This alliance between OFY and LIP projects and inmates may seem strange at first, but on closer analysis makes considerable sense. Many of the people applying for OFY and LIP projects are themselves distressed by

³⁶ See e.g. Seymour Halleck, *Psychiatry and the Dilemmas of Crime* (New York: Harper & Row, 1967).

The more recently developed economic theories of criminal behaviour also support this view by stressing that crime competes with legal occupations as a source of income, and participation in crime varies directly with its net benefits (which include not only wealth but respect) and inversely with the attractiveness of legal occupations. Consider the remarks of one researcher who studied the behaviour of street gangs in Chicago and concluded:

"The youths of Logan Square take a dim view of the available jobs, which mainly consist of unskilled, low paid, hazardous, insecure and boring factory work. Crime at least provides the opportunity to advance, gaining power through improvement in technique: it may be the only investment in human capital presently available."

R. Feldman, and G. Weisfeld, *An Interdisciplinary Study of Crime* (1973), 19 Crime and Delinquency 150 at 161.

and alienated from traditional work opportunities available through the market place or government employment, both of which are premised upon either a profit model or a delivery of professional services model and are structured within a complex and restrictive organization system. Many inmates are similarly alienated, only their alienation has hitherto taken more anti-social forms. That they should both be turned on to less restrictive and more liberating work opportunities is therefore a natural phenomenon. None of this of course is to say that the answer to crime is Youth Opportunities writ large, but suggests that the present solution of offering inmates, who have rejected straight work for good reason, more opportunities to participate in straight work is clearly not going to be very successful, especially when those opportunities are provided in a coercive framework.

The process of using coercion as a means of securing compliance with standards of behaviour in the institution, when those standards are secured by non-forceful means on the street, is also shown through the enforcement of section 2.29(g) of the Penitentiary Regulations. This makes it an offence to be disrespectful towards any other person, although in practice it is enforced only against inmates who are disrespectful to guards. Respect for a law enforcement officer is not enforced on the street through any legal sanction, although of course the police can covertly enforce a demand for respect by arresting on charges of obstruction or causing a disturbance, whether or not the matter ever proceeds beyond arrest and spending a night in the police lockup. The point is, however, that we do not feel it necessary to officially punish disrespect. Why is it different in the prison system? The answer may simply be that this rule reflects the military heritage of the prison where the need for respect is necessary to maintain the integrity of the system, the system depending upon those lower in the hierarchy automatically deferring to those higher. If this is the only reason it clearly can be dismissed along the same lines as previous criticism of the relevance of the military model to the penitentiary service. In any event, any attempt to justify this particular offence on the basis that inmates have to obey the orders of the custody staff, is negated since refusal to obey an order is made specifically and quite justifiably a separate offence. We may be left with the justification that such a rule is retained as a morale booster for the custody staff to legitimate their function and worth. However, the price of this is to further illegitimate lawful authority since inmates, like the rest of us, know that respect as opposed to fear is something that is earned not instilled by force, and that therefore legitimate authority seeks not respect but conformity through fear, perhaps because the normal conditions for gaining respect — equality of opportunity and social justice — are absent.

The "Offence" of Drug Abuse — A Case Study of an Exceptional Rule

It is not however the rules concerning two in a cell, "standing to" for the count or those which demand work and respect that dominate the concern of inmates. This is reserved for the enforcing of the prohibition against drug use within the institution. This concern is natural since many of the population at Matsqui are drug addicts. Both from the inmate's and the administration's point of view, drug use constituted the number one problem

at the institution. In terms of the research study, disciplinary proceedings arising out of drug use are of major importance, since they represent the greatest percentage of cases where the most severe sanctions were imposed — segregation and/or loss of statutory remission. It is necessary to examine the offence of drug use in some depth as it is the best illustration of the importance of and need for the same kind of scrutiny regarding the rules of the private criminal law of the prison as we employ for the criminal law of the free world.

During the period of study, an inmate suspected of using drugs was required to give a urine sample, which was then sent to the Narcotic Addiction Foundation in Vancouver for thin layer chromatography analysis. If the analysis indicated that the sample was positive for the drug suspected (usually morphine but sometimes methadone or barbiturates) then a charge was laid against the inmate for using drugs.

It should be stated at the outset that inmates were not normally charged with possession of drugs in Warden's Court. If drugs were found, and this most often occurred when a recently used syringe was discovered, the practice was to refer the matter to the police and charges were laid in outside court. The offence that was dealt with in the institution was that of *using drugs*, something which is not a criminal offence at all on the street. Initially, the use of drugs was treated as an act calculated to offend against good order and discipline under Section 2.29(k) but the later practice, which has continued to the present, was to deal with the matter under 2.29(h) as an act of wilful disobedience or failure to obey a regulation or rule governing the conduct of inmates. However, a careful perusal of the Penitentiary Act, Penitentiary Service Regulations, Commissioner's Directives and Matsqui Standing Orders fails to reveal any rule or regulation prohibiting the use of drugs by inmates. The nearest thing is a Standing Order which states that:

The inmate training program at the Matsqui institution shall be aimed at enabling inmates to live useful and productive lives in society without

- (a) engaging in criminal activities
- (b) resorting to the use of narcotics.³⁷

This is no more than a general preamble of the rehabilitative ideal at Matsqui³⁸ and is clearly not intended to create a specific rule or regulation enforceable under the disciplinary code. To so construe it would permit the punishment of any conduct which, in the view of the prison staff was likely to lead to either criminal activities or narcotic use, without the requirement of any further written rule or regulation. Under such an interpretation, there clearly would be no need for any further Standing Orders at all, so wide would be the scope of this preamble. Yet there are detailed Standing Orders dealing with a whole range of conduct of inmates within the institution which strongly militates against this expansive interpretation. There seems, therefore, to be the gravest doubt as to the legality of the past and current prac-

³⁷ Standing Orders 3.1(5).

³⁸ The Standing Order appears under the general heading of "Statement of Duties and Responsibilities of the [Inmate Training] Division Generally."

tice at Matsqui of treating use of drugs as a violation of a rule or regulation of the Institution. This has significant implications since all convictions of drug use during the period of the study resulted in the loss of statutory remission. As we shall see later, one of the cases in which the decision of the Disciplinary Board is reviewable by the courts is one where the decision affects statutory remission, and one of the grounds for review is that the Board acted without jurisdiction. Clearly, if there is no rule or regulation prohibiting drug use, the Board in punishing on the basis of such a rule or regulation has acted without jurisdiction.

However, it is not only the "offence" of drug use which is legally suspect. Inmates vociferously argued that the method of proof, the urinalysis procedure, was also illegal in that it denied them their rights against self-incrimination under the Canadian Bill of Rights.³⁹ The Supreme Court of Canada in *R. v. Cunniff*⁴⁰ has recently considered challenges on similar grounds to the analogous breathalyzer provisions of the Criminal Code. These provisions⁴¹ authorise a police officer to demand a breathalyzer test from a suspected impaired driver, make it an offence to refuse without reasonable excuse such a demand and permit a court to draw an adverse inference from such a refusal on a charge of impaired driving. It was argued that they conflicted with the Canadian Bill of Rights in that they deprived "the right of the individual to . . . security of the person . . . without due process of law" contrary to section 1(a), and violated the protection against self-incrimination guaranteed by section 2(d). The Supreme Court in upholding the breathalyzer provisions rejected both contentions. On the issue of self-incrimination, Mr. Justice Laskin, as he then was, writing for the majority held that the formulation of the privilege in section 2(d) was a qualified one. It only afforded protection against the giving of compelled evidence before a "court, tribunal, commission, board or other authority" and this did not extend to the giving of a compelled breathalyzer to a police officer even if the results of that compelled evidence were introduced before a court or tribunal. Quite apart from this point, Mr. Justice Laskin also held that the text of section 2(d) only protected the person from having, himself, to give compelled evidence before a court; it did not protect against the use of "self-incriminating" statements produced through third party evidence, in this case, the evidence of the police officer as to refusal to take the test or the analyst as to the results of the test. In addition, while the majority of the Court did not specifically decide this point, it seems fairly clear from what was said both in this case and in previous decisions of the Supreme Court of Canada, that the privilege against self-incrimination is concerned with self-incriminating statements and does not extend to incriminating results of a physical test as to the condition of the body.⁴² This distinction is based on the supposed rationale for excluding self-incriminating statements, that they may be false,

³⁹ 8-9 Elizabeth II, c. 44 (Canada).

⁴⁰ (1972) 26 D.L.R. (3d) 603.

⁴¹ Criminal Code, R.S.C. 1970, c. C-34, ss. 234-238.

⁴² See for example *A. G. of Quebec v. Begin* [1955] S.C.R. 593.

which clearly has no application to the results of a physical test.⁴³ It would seem clear from this decision that the argument that the introduction of urine analysis evidence before the Disciplinary Board as proof of a charge of use of drugs infringes the privilege against self-incrimination is not supportable in law.

The other basis for impugning the breathalyzer provisions, that they violated the individual's right to security of the person without due process of law, was based on the submission that the term "due process of law" as used in the Bill of Rights created a qualitative test which legislation had to meet, such as has been developed in the interpretation of that phrase in the Fifth and Fourteenth amendments of the U.S. Constitution. Mr. Justice Laskin in rejecting that submission pointed to the English antecedents of the due process clause in the Canadian Bill of Rights which indicate its concern with procedural considerations.

However, whatever the exact interpretation of the due process clause, it is abundantly clear from *R. v. Curr* that at the very least it means that none of the protected rights in 1(a), including security of the person, can be impaired without some legal authority. Quite clearly in the *Curr* case the breathalyzer provisions were specifically authorized by duly enacted amendments to the Criminal Code. Returning to the problem we are considering in the prison, the process of urine analysis clearly impairs the "security of the person" and therefore requires some legal authorization. Certainly there is nothing in the Penitentiary Act, Penitentiary Service Regulations, Commissioner's Directives, Divisional Instructions or Matsqui Standing Orders which specifically authorize the demand for a urine analysis for suspected drug use or which make provisions for the consequences of refusing such a demand. While section 2.31(2) of the Regulations authorizes the search of an inmate (and others) where the Institutional Head suspects on reasonable grounds that he is in possession of contraband, there are a number of arguments against interpreting this authorisation to include search through urine analysis. In the first place the section talks of a search to discover "possession" of contraband whereas urine analysis is clearly aimed at discovering past use. Secondly, and more important, urine analysis is a far more complicated procedure than a normal physical search and, as the following discussion will show, one prone to error. It should therefore require specific authorisation setting out the exact requirements for search and subsequent analysis. Certainly this is what is done in the Criminal Code in relation to the breathalyzer test and also under the Narcotic Control Act for analysis of drugs. Urine analysis is less accurate than the process involved in analysis of either a sample of an alleged drug or analysis of breath to determine its alcoholic content. The very enactment of the breathalyzer provisions in the Criminal Code support this second line of argument since if urine analysis comes within the meaning of a search under the Penitentiary Regulations then clearly the breathalyzer

⁴³ Some physical test, for example lie detector apparatus, may be directed to eliciting responses which are essentially testimonial and these could be within the scope of the privilege. See *Schmerber v. California* (1966), 384 U.S. 757 per Brennan, J. commented on by Mr. Justice Laskin in *R. v. Curr* (1972), 26 D.L.R. (3d) 603 at 622.

test would be authorised as a search incident to arrest on impaired driving and no specific authorisation by statute would be required. Clearly such specific statutory authorisation indicates an awareness by Parliament that the modern forms of "searches" made possible by technological advance create different problems than traditional searches and require special authorisation and procedures for their conduct and the admission into evidence of their results. So also with urine analysis.

In the absence of clear legal authorisation it seems to this writer that an inmate faced with a request for a urine analysis can refuse to submit to such a test and a subsequent charge laid against him for refusing to obey a lawful order of the Penitentiary officer would not be supportable since the order to submit to the test would not be such a lawful order. Nor would the inmate be contravening a rule or regulation governing the conduct of inmates since there is no such rule or regulation requiring submission to a urine analysis. Even if a charge were laid under the broadest of rubrics, doing an act "calculated to prejudice good order and discipline," it is difficult to see how refusing an illegal demand can be said to be such an act.

On the basis of this analysis I therefore come to the alarming conclusion that in Matsqui not only are inmates disciplined for a non-existing offence but that "offence" is proven through a process which is not legally authorised. A better example of the allegation that prison is a "lawless agency" would be hard to find.

Whatever the legality of past procedure at Matsqui and whatever the implications, it is of course possible to pass a rule or regulation prospectively prohibiting the use of drugs and specifically authorising the urinalysis procedure to prove such use. This raises the question whether such use should be an offense in the prison when it is not an offense on the street. To answer this, we need to consider whether there are any justifications for a different rule in the institution to that on the street, and if there are such justifications, to further subject the prohibition of "use" in the prison to the same kind of analysis to which prohibition of "possession" on the street is being subjected, to see if the benefits achieved by the prohibition outweigh the costs of the prohibition.⁴⁴

To see what differences there might be to justify differing kinds of drug prohibition in the institution from that existing on the street, we must identify why we prohibit possession of drugs on the street. It can be argued that on the street the real evil that the law is directed to is the pusher or trafficker of drugs, and that mere possession, unaccompanied by actual trafficking, is prohibited simply to enable law enforcement to secure convictions against traffickers. On this basis there is really no need to prohibit use, as the user is merely the victim and is only to be brought within the enforcement policy to the extent that his use involves possession for trafficking pur-

⁴⁴ For examples of this cost benefit analysis to the issue of criminalisation of drug use see J. Kaplan, *Marijuana — The New Prohibition* (New York: World Pub. Co. 1970) and *Cannabis, A Report of the Committee of Inquiry Into the Non-Medical Use of Drugs* (Ottawa: Queen's Printer, 1972) ch. 6 — LeDain Report.

poses. In the prison, however, the focus of enforcement is different. That focus is use rather than possession since many of the inmates are in prison because of their habit of using drugs and breaking that habit is seen as fundamental to the correctional process. Thus prohibiting use in order to rehabilitate those habituated to use is of more concern than "getting at" drug traffickers. This is not to say that in the prison trafficking is unimportant. While it is considered by correctional authorities as being a major problem, since it gives rise to strongarming and intimidation, they are able to use the normal street offence of possession to deal with traffickers and in fact the practice at Matsqui of referring cases for prosecution in outside court was mainly reserved to those who were suspected of being traffickers.

There is an alternative basis for the different prohibitions on the street and in the prison. This assumes that one of the objects of the drug laws is to penalize the user, not to get at the trafficker, because drug use constitutes an affront to the dominant moral values of society. The law, however, does not prohibit use as such, because it would be too difficult to secure convictions, having regard to due process protections built in to the criminal procedure system — the laws of search and seizure, the presumption of innocence and the rules relating to admissibility of evidence. In the prison, however, these limitations are not operative and therefore there is no reason to limit the prohibition to possession since securing convictions for use imposes no real enforcement difficulties.

I will assume, since I think it is a fair reflection of the administration's view, that the dominant justification for prohibiting drug use is the legitimate correctional goal of rehabilitating drug users. It now becomes necessary to look at the costs and benefits of a special prison rule prohibiting use of drugs and permitting proof through urinalysis.

In recent years much has been written about the costs of enforcing drug laws, in terms of the intrusive and offensive methods that law enforcement has to engage in to collect evidence, the injustice of the selective enforcement of the laws, and the alienation from and disrespect for law such enforcement breeds in those against whom the laws are selectively and intrusively enforced.⁴⁵ It is suggested that these costs do not stop at the courtroom but carry on through the prison walls and are magnified by the enforcement, through urinalysis, of a prohibition against use of drugs.

Clearly, urinalysis is physically intrusive and personally offensive. At Matsqui the practice was to give the inmate a glass bottle into which he was told to urinate while the guard observed him through an overhead mirror. If at that point he could not provide a sample he would usually be taken to the segregation section where he was placed in a bare cell, without a sink or toilet, until he was ready to produce. While the physical intrusions of urine analysis may appear less blunt than enforcement tactics on the street,

⁴⁵ *Id.*

seen in the context of the prison, in light of the inmate's already limited privacy, they are equally offensive.⁴⁶

Similarly, selective enforcement is as prevalent in Matsqui as it is on the street, caused not only, as on the street, through the exercise of discretion by those enforcing the rules, but also through the randomness and arbitrariness of the urine analysis system. Although the most common demand for a urine test is occasioned by observing the inmate acting bizarrely, nodding, or being unsteady on his feet, other demands, particularly those made by counsellors, may be occasioned not by such immediate observations but by a more generalized "feeling" that the inmate is using drugs. While such a demand is not arbitrary from the counsellor's perspective, since some counsellors resort to this method of monitoring an inmate's condition more often than others, this results in a randomness of testing and seems arbitrary to inmates since their being tested depends upon which counselling group they are in and their relationship with the counsellor.

Another source of perceived arbitrariness is in the results of testing. Inmates' complaints here are of two kinds. The one is that some men who get tested have in fact used drugs and yet the test comes back negative, and the other that some of the men who have not used drugs get back a positive test. The first of these criticisms is in fact an inevitable part of urine testing as presently carried on. Under this testing a positive test is recorded only where the heroin (or other drug) reaches a certain level. Thus inmates who may well have used heroin prior to their testing can and do receive a negative test result, either because they used very little heroin or because they used it sufficiently before the test to have excreted all but a small part of the heroin from their system. Not unnaturally, inmates, who know better than anyone who is using drugs and who is not, regard it as arbitrary that some users get positive and some get negative results depending really on how much the drug was cut and whether they were tested at the appropriate time to yield a positive result. This arbitrariness is also recognized by some people working in the penitentiary service as a necessary consequence of urine testing. Thus a psychiatrist at Matsqui in evaluating urine testing concluded that "the use of the urine test as an instrument of medical-legal detection of punishment is of little value since unless the quantity of heroin taken is large the culprit will escape detection more often than not and the infliction of punishment will be arbitrary and inconsistent."⁴⁷

The other kind of complaint, that inmates who had not used drugs received positive samples, is clearly of a more serious order. It is based on the view that samples are mixed up or are inaccurately analyzed or that results are confused with the sample they represent. This complaint is a

⁴⁶ There are occasions however in Matsqui when enforcement tactics rival those of the heavy-handed drug squads on the street in terms that "shock the conscience". During our period of observation one inmate, who was picked up by the local police while on a temporary absence pass for being in the company of a known addict, was on his return to the institution placed in segregation and forcibly given a purgative because the police suspected that he may have swallowed drugs to bring back to the institution. The inmate was in segregation for 36 hours and no drugs were discovered.

⁴⁷ Memorandum of Dr. Derek Neale, July 16, 1971.

frequent one from inmates. One inmate expressed the view that the worst thing about being required to give a urine sample was not the demeaning manner in which the sample was taken, but the worry that the sample might come back positive, irrespective of whether you had or had not used drugs. As he put it, "It's a feeling that you are totally controlled by a system which you can't do anything about and which you know makes mistakes."⁴⁸

While the prison administrators at Matsqui insist that there is no margin of error in the urine analysis, the inmate's perception that urine analysis is prone to error is supported by clinical research in this area.⁴⁹

The performance of even the "best" toxicology laboratories on urine drug screens is grossly defective with frequent false-positive and false-negative results and mis-identifications. . . . There is a serious question whether urine screens should be done at all under current circumstances. Frequently, incorrect laboratory data are worse than no laboratory data. The waste of money and the potential

⁴⁸ The feeling is in fact so pervasive that it affected the writer. On one occasion, an inmate asked for legal advice in a situation where a drug outfit had been found in his cell. He vehemently stated that he was not a drug user and felt that the outfit had been planted in his cell as a means to pressure him to bring drugs back into the institution — he was going out on temporary absence passes. I advised him to go over to the hospital to have his arm checked for needle marks but hesitated to advise him to submit himself for a urine sample, although he insisted that it would come back negative. Both he and I felt that it might come back positive and make his position worse even though he claimed he had not used drugs. Eventually I did recommend him to take the test and he did take it. It came back negative.

⁴⁹ In perhaps the most impressive of these studies the researchers sought to check the validity of urine analysis reporting by different laboratories. The two laboratories used in the study were two reputable New York laboratories which had achieved excellent results repeatedly in the New York State Drug Abuse Proficiency Test. The New York State Department of Health regularly evaluates licensed laboratories to assess their ability to perform toxicological analysis of urine for drug abuse programmes. As a first step in examining inter-laboratory reliability, a sample of patients' urines were divided between the two laboratories. Over a period of 10 months from August 1970 to May 1971 a sample of 2,395 urine specimens from methadone maintained patients were submitted to the laboratories for detection of morphine, quinine, methadone and barbiturates. The researchers suggested that a way of considering the degree of discrepancy between the two laboratories was to ask the question "How would results be changed if the program required two laboratories to agree when a given specimen was positive?" The results indicated that 90% of methadone, 27% of quinine, 35% of morphine and 90% of barbiturates originally considered positive would then be considered false positives. Following this the researchers divided and sent known specimens containing methadone and morphine in appropriate concentrations to both laboratories. Laboratory A incorrectly identified methadone in 3 of 7 samples that did not contain methadone. Laboratory B falsely identified methadone in 4 samples that did not contain it. The researchers noted that methadone was correctly and falsely identified by the laboratories in different samples; that is, the same mistakes were not made on the same samples. For morphine, laboratory A did not find morphine in the 7 samples that did not contain morphine but laboratory B falsely identified morphine in 4 of 7 samples that did not contain morphine. The researchers' conclusions are that

"The problem of reliability exposed here may have far reaching implications for all methadone programs . . . it is thought that the variability of results here is severe enough to bring into question the monitoring value and clinical use of urine analysis data unless the quality of that data is adequately substantiated."

See C. E. Riordan et al., *A Comparison Study of Thin Layer Chromatography Urine Analysis Results*. Proceedings of the 4th Nat'l Conference on Methadone Treatment (1972) 333. This research was conducted by the Addiction Research and Treatment Corporation, Brooklyn, N.Y. and Yale University Medical School.

harm to persons tested may exceed any benefits gained by these programs except for the clinically ill patient.⁵⁰

It is not difficult, in light of professional judgments such as these, to understand why inmates at Matsqui bitterly attacked the urinalysis procedure as being fundamentally unjust.

In addition to the costs of alienation from and disrespect for legitimate authority caused by such intrusive and arbitrary enforcement of the prohibition against use of drugs, there are other costs incurred within the prison system that have no counterpart on the street. The fact that any use when discovered and confirmed through positive urine analysis will lead to punishment inevitably results in an unwillingness on the part of the inmates to admit to their counsellors that they have been using drugs.⁵¹ This means that many of the inmates who are addicts are forced to deal with the counselling staff on the basis of a basic falsehood; though they are using drugs in the institution they cannot admit this to their counsellors and since their drug use constitutes their main problem in life it is difficult to see how any real rehabilitative changes are likely to be made through counselling premised on such a falsehood.

The costs do not sound only in what we might call the psychological wellbeing of inmates, but also in terms of their physical wellbeing. During the period of this study several inmates were hospitalized because of hepatitis caused by using dirty syringes. However, the writer was told by inmates that there were a number of other drug users in the institution who thought that they had hepatitis but refrained from reporting to the hospital because they were near the end of their sentences and felt that if they reported they would be urine tested and since their samples would come back positive they would lose statutory remission which would delay their release. This clearly poses a danger not just to the health of the particular addicts but to the health of everyone in the institution. It arises directly from the policy of punishing the use of drugs within the institution.

In evaluating this policy of punishing drug use, we cannot just enumerate the costs of such a system but must also consider the benefits. The main benefit presumably would be that enforcement and punishment limits the amount of drug use, in other words, operates as a deterrent both specifically and generally. From the limited amount of research which has been done thus far on the operation of general deterrence, we should be very skeptical as to the efficacy of punishment of drug use by inmates as a general deterrent. The limited knowledge that we do have suggests that the deterrent effect of punishment is least likely where there is a high commitment to crime as a way of life, combined with an involvement in an act that is expressive, and that drug use by addicts is the best example of such a combination.⁵² Most addicts on the street see their lives as revolving around their

⁵⁰ (1972), 287 *New England Journal of Medicine* 724.

⁵¹ During Warden's Court when an inmate was found guilty of using drugs he almost invariably stated that it was a single lapse.

⁵² See W. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions* 1967 *Wis. L. Rev.* 703.

being addicts, and their involvement in the drug culture is what gives them an identity, and this is no less the case within the institution.⁵³ Similarly, their use of drugs is an overt expression of both a physiological and psychological dependency on drugs, and this also does not change within the prison but rather is intensified since the prison regime, where inmates have little control over the daily occurrences in their lives, reinforces a state of dependency. Of course on the street, some argument can be made that whatever the efficacy of punishment on drug addicts, this does not gainsay its effectiveness on those in the general population who have not, but might, be tempted to use drugs were it not for the punishment. This argument, however, is of limited value in the context of the prison, since the purpose of punishment within the prison surely is not to deter those on the street but is addressed to the prison population. Thus, it becomes possible to be more precise about general deterrence within the prison in terms of a marginal group analysis, that is, it is possible to identify those in the prison who are not addicts but who have access to drugs if they want it, and to consider whether the threat of punishment has a deterrent impact on them. Since this consists of well over half of the population at Matsqui, the effectiveness of punishment as a deterrent on this group is an important consideration, particularly since it is not at all uncommon for drug addicts to first get turned on to hard drugs while in prison.

In assessing the likely impact of punishment on this marginal group of inmates who are not addicts, it is necessary to consider some of the variables which general deterrence research indicates is of importance. The first such variable is the certainty of apprehension and conviction.⁵⁴ In the context of Matsqui, the enforcement of the rule against drugs is random in its effect. Thus an inmate who has not been identified as an addict and therefore is not under suspicion of drug use, can justifiably feel that so long as he is discreet he is unlikely to be urine tested, and if he is urine tested, the test may still come back negative because of the timing of the test. A second variable is the size of the penalty. While I have argued elsewhere that the 30 days' loss of remission — the normal penalty for drug use at Matsqui during our observations — is a serious penalty for the purposes of determining what pro-

⁵³ Another researcher has described this situation in B.C.'s largest provincial jail: "For the heroin addict, life in the East Wing is hardly less therapeutic than the drug scene at the corner itself. The virtues of heroin use are continually reiterated, heroin is the main topic of discussion, and attempts to get drugs legally from the prison doctor and illegally from the outside are a pastime with the wing. Although being in the East Wing drastically reduces the amount of illicit heroin use, it does not reduce the importance of the drug in the inmate's life. In or out of East Wing, heroin appeared to be the prime motivating factor to the addict. Most addicts view incarceration as just another aspect of heroin use. Incarceration in East Wing may act to deter some inmates from committing subsequent criminal acts but its deterrent value appears far outweighed by the negative effects it has on other inmates, introducing them to heroin use, and providing them with the criminal contacts and knowledge which will encourage subsequent crime."

R. Solomon, *Okalla Complex*. Unpublished research paper prepared for the Commission of Enquiry into the Non-Medical Use of Drugs. May 7, 1971.

⁵⁴ See J. Andrenas, *The General Preventive Efforts of Punishment* (1966), 114 U.Pa.L.Rev. 949.

cedural safeguards should precede its imposition, for the purposes of the present analysis it must be seen in the context of the federal penitentiary service where, with a few exceptions (in the case of escapees from provincial institutions), all inmates are serving at least 2 years and many substantially longer terms of imprisonment. Subject to one qualification, a conditional⁵⁵ punishment of 30 days is not likely to loom large in deterrent terms to a population who have already indicated that they are undeterred by punishments much greater.

The qualification mentioned in the last paragraph relates to a final variable in considering the general deterrent effect of punishment, the immediacy of punishment.⁵⁶ In most cases the loss of statutory remission is not an immediate punishment. It simply means that the inmate will leave prison 30 days later than he otherwise would. Thus, the loss of 30 days remission is not only conditional but is also deferred. However, the amount of that deferral will of course vary with the amount of time the inmate has left to serve in prison. Therefore, it is likely that the effect of 30 days loss of remission will be significant as a general deterrent, even in the case of an addict, as his sentence draws to a close and the immediacy of the punishment becomes more apparent. This is in fact confirmed by the case of the inmates who did not report to the hospital for treatment for suspected hepatitis, for fear that any conviction for drug use which followed their urine testing would delay their impending release from Matsqui.

Is the punishment of drug use any more likely to be effective as a specific deterrent — that is, to prevent or reduce the future drug use by those inmates who are apprehended, convicted and punished? Here again we must divide the inmate population into two groups. It is unlikely that any real impact will be made upon addicts for the same reason as given in the discussion of general deterrence, their non-amenability to the threat of punishment in relation to high commitment-expressive behaviour. However, in relation to the non-addict, the position may well be different. The non-addict, once he has been identified and punished as a user, is more likely to be urine tested in the future so that the risk of apprehension and detection is considerably increased, although there still remains the question of the efficacy of the size of the penalty. It is likely therefore that in the case of the non-addict, punishing drug use may well be effective as a specific deterrent, though the effect may be short term lasting only until the inmate has allayed suspicion as to his drug use.

It would seem then in terms of the practice at Matsqui, there is little likelihood that the anticipated benefits from punishing drug use are being or are likely to be achieved. Increased certainty of apprehension and increased and more immediate penalties are likely to have significant impact on suspected non-addict users although unlikely to have much effect on addicts. However such stepped up enforcement would increase the present costs of the system in strengthening inmates' negative attitudes and in under-

⁵⁵ Conditional since forfeited statutory remission can be regained under certain circumstances.

⁵⁶ See B. F. Singer, *Psychological Studies of Punishment* (1970), 58 Cal.L.Rev. 405.

mining completely the assumption that Matsqui is concerned with rehabilitation rather than punishment.

The preceding analysis has not dealt with the legitimate interest of the prison staff in discovering information about drug use within the institution. Ironically, the urine analysis was originally conceived as a device to supply such information both from an epidemiological and clinical perspective. Through a regular system of urine analysis, it is possible to find out whether inmates who are addicted are using the same quantity as would be used outside the institution, and what the pattern of use is within the institution. From the clinical point of view, a properly administered urine analysis system enables counsellors to confirm their opinions, arrived at on other grounds, that certain individuals are using or are not using drugs at a particular period of time. Since an addict, even if he stops using, is liable to relapse into a state of addiction again, continued use of the tests may permit an early warning that use is beginning and enable counselling support to be offered. Clearly, there is no need from either of these perspectives to use information obtained from the urine samples as the basis for punishment, and indeed from the clinical point of view it is surely counter-productive to do so. Abandoning the practice of using urine tests as a basis for punishment would not therefore undermine the original rationale for the test but would reduce some of the costs mentioned previously since there would be no longer arbitrary infliction of punishment with the resulting alienation and hostility which this engenders among inmates. There would still remain the cost of invasion of privacy and dignity in the administering of the test, but that cost may be one that can be borne so long as the benefits are real. However it is not clear to the writer that the present system in use at Matsqui, which seems to be one of random testing under conditions of dubious scientific reliability, is likely to achieve these benefits and pruning the system of arbitrary infliction of punishment will do nothing to change the fact that it is likely to yield equally arbitrary epidemiological and clinical information.

Part II The Philosophy and Practice of Prison Justice

Pre-Trial Dispositions

The contours of the process of discipline in prison bear a close resemblance to the larger criminal justice system outside prison. Starting from the alleged violation there is a variety of responses which those enforcing the prison regulations can make, short of laying a formal charge. A prison guard at Matsqui has the choice of administering a warning, placing the inmate on "early lockup", or making an incident report to his superiors, none of which involve the filing of an offence report which, like an information or indictment, starts the formal disciplinary process in motion. There is therefore in prison, as in the street, a selective filtering out of cases which those enforcing the rules do not view as requiring a formal trial to accomplish the purposes of the disciplinary system.

The informal warning is straightforward and needs no further comment. Under the early lockup procedure, which is a fairly recent innovation in the federal penitentiary service, a guard can order an inmate he believes has committed an offence to "lockup" on that or a following evening. "Lockup"

simply means that instead of being free to move through the institution until 9 o'clock and being free to move on his tier until 11, the inmate is required to go into his cell at 7 o'clock and remain there the whole evening. The purpose of the procedure is to avoid the necessity of a formal charge and appearance before the Warden's Court in the case of trivial offenses, and to give the guards increased responsibility for handling discipline. Prior to the use of early lockup, the guards were required to report every infraction which was then handled through the formal procedure. From the point of view of reducing the case load of Warden's Court, the early lockup procedure has been undoubtedly successful. In 1969 and 1970 the Court, with an inmate population of some 275, handled close to 340 cases each year and in 1971 and 1972 when the population had increased to 325 the Court handled a little over 200 cases. What is equally important is the fact that certain offenses are now almost exclusively dealt with by early lockup. Whereas up until 1970 the great bulk of Warden's Court appearances arose out of charges of two inmates in a cell, failing to "stand to" for the count, and being late for work, these are now rarely dealt with by the formal process (except in the case of persistent violation) but rather by early lockup. There has therefore been a gradual transition for these minor kinds of offenses from the formal to the informal disciplinary process.⁵⁷

We asked inmates their opinion of the early lockup procedure and in particular whether they felt that any early lockups they had been given were fair or unfair. They seemed evenly divided as to the fairness of the procedure depending on whether they felt the lockup was deserved. Many felt that the lockup was not deserved since it was given to enforce rules which were petty, especially the two in a cell and failing to "stand to" for the count rules. They also felt the procedure was used unevenly by particular guards who administered the punishment as if the inmates were children being sent to their rooms, an attitude which was very much resented by the men.

If a guard feels that a violation is too serious to be dealt with by early lockup, he can write up an offense report. Divisional Instructions state that the offense report is to be passed on to a supervising officer who is to investigate the incident in order to ascertain the facts, and upon completion of his investigation to forward the report with his findings to the Institutional Head for appropriate action. The practice at Matsqui varied from this format in that initially the guard who observed the offense would in most cases talk to the supervising officer on duty to decide whether to write up an offense report, and if a report were written, this was then forwarded to the Assistant Deputy Director (Security) who is the chief security officer in the institution.⁵⁸

⁵⁷ For example, in September 1972 early lockup was used against those who had committed the following offences: not standing to for the count, two in a cell, sleeping in, being late for work, swearing at an officer, not shaving, being uncooperative and leaving place of work without permission.

⁵⁸ The Assistant Deputy Director (Security), (hereinafter referred to as 'A/D/D(S)') is *de facto* responsible for overall supervision of the conduct of the guards. Unlike other members of the prison administration he wore a guards uniform and was the member of the administration with whom the guards identified and to whom they regarded themselves as owing their prime allegiance.

Since the offense report provides room only for a very brief statement of the facts upon which it is alleged that an offense has been committed, the offense report is usually accompanied by handwritten incident reports which set out in greater detail exactly what happened. In some cases the A/D/D(S) having read the offense and incident reports would ask for further details and in a few cases he would have the inmate in to discuss the matter with him.

Not all alleged violations which give rise to offense reports are heard by the Disciplinary Board. The writer was told by the Superintendent of Matsqui, who usually presided over the Board, that he made it a practice of reading all offense reports the day before they were to be heard, and referred a number of the cases to the inmate's counsellor, to be dealt with by the counsellor as part of the group counselling program. During the period of this study this practice occurred on only a few occasions, and since this method of dealing with cases is really quite different from the normal disciplinary procedures, it will be dealt with in greater depth later in the article, where consideration is given to the question of alternative methods of dealing with alleged disciplinary violations within the prison setting.

The Hearing Before the Disciplinary Board

For cases which are not disposed of in this way, a hearing takes place in accordance with the Divisional Instructions. Under these Instructions the Institutional Head or his lawful deputy is required to hear all cases and at Matsqui the cases were usually heard by the Superintendent of the Institution.⁵⁹ However, during part of the period of this study, the Superintendent was also Acting Director in the absence of the Director and during this period the court was presided over by the Assistant Deputy Director

⁵⁹ There would appear to be a legal query as to the jurisdiction of the Superintendent to hear disciplinary cases prior to 27th Sept. 1972. Until that date section 2.28(2) of the Penitentiary Service Regulations provided that no inmate shall be punished except pursuant to order of the Institutional Head or his lawful deputy. The Superintendent, while the lawful deputy when the Director is absent from the institution, is not the lawful deputy at other times. Therefore when acting in his capacity as Superintendent he has jurisdiction to hear disciplinary cases only to the extent that such jurisdiction can be delegated to him by the Institutional Head. Section 1.12(2) of the Regulations permits delegation by an Institutional Head to his immediate subordinates in matters of routine or of minor administration except where otherwise provided by law. Clearly section 2.28(2) provides otherwise. If this analysis is correct it means that all decisions of the Superintendent made before 27th September, 1972, except where acting as Acting Director and therefore as lawful deputy of the Institutional Head, are without jurisdiction. A Commissioner's Directive of May 13, 1971 purported to permit Institutional Heads to delegate generally to their subordinates but to the extent that this is inconsistent with the Regulations the Directive clearly has no binding effect. A recent Divisional Instruction replacing the one of May 13, 1971 apparently attempts to deal with this problem by specifically appointing the Assistant Director of Socialization (the new title for the Superintendent) as the lawful deputy of the Institutional Head. On 27th September, 1972 section 28(2) was amended to provide that no inmate shall be punished except pursuant to an order of the Institutional Head *or an officer designated by him*. The amendment cannot have a curative effect on any prior lack of jurisdiction.

(Security).⁶⁰ This was somewhat unusual in that, normally, when the Superintendent is absent or is acting as Acting Director, someone else is appointed as Acting Superintendent and he presides over the Board. This was reflected in our analysis of the records where over the four year period, most of the senior administration had at some time presided over the Disciplinary Board in the capacity of Acting Superintendent. Under the Divisional Instructions it is stated that two staff members may be appointed to assist in a hearing, although their role is as advisors only. During our period of study these two other staff varied. When the Superintendent was presiding, one of the advisors was usually the A/D/D(S) and the other was either the Supervisor of Classification or a counsellor.

The Divisional Instructions also set out a number of other provisions for the hearing of charges. Thus,

(b) No finding shall be made against an inmate charged under Section 2.29, Penitentiary Service Regulations, unless he:

- (i) has received written notice of the charge against him and a summary of the evidence alleged against him;
- (ii) has appeared personally at the hearing; and
- (iii) has been given an opportunity to make his full answer and defence to the charge, including the questioning of witnesses and the introduction of witness or written material either in denial of the offence or in mitigation of punishment.⁶¹

In addition to the Divisional Instructions, Matsqui Standing Orders also deal with the procedure of the hearing of charges before the Disciplinary Board. They provide for representation at the hearing by requiring the counsellor of an inmate to attend at the hearing with him⁶² and further provide that guards required to testify at the hearing shall do so under oath.⁶³ Somewhat significantly they also provide that inmates required to testify shall be asked if they wish to do so under oath and that the Board may, in its discretion, consider their evidence with this in mind.⁶⁴

It would therefore appear to someone simply reading the rules that disciplinary proceedings in the federal prison system are surrounded by substantial due process protections, and at least in their procedural aspects, they

⁶⁰ The same considerations as mentioned above apply here as well. The A/D/D(S) clearly is not the lawful deputy of the Institutional Head and his jurisdiction must therefore be traced to a valid delegation which, as I have explained, cannot lawfully be done in relation to disciplinary matters consistent with sections 1.12 and sections 2.28(2) of the Penitentiary Regulations. This legal cloud on jurisdiction has significant implications in terms of judicial review as will be discussed below.

⁶¹ Divisional Instruction No. 300.01, s. 8(b), April 4, 1972.

⁶² Standing Order 3.12(6).

⁶³ Standing Order 3.12(3).

⁶⁴ Standing Order 3.12(4).

bear a fair approximation to the basic elements of a criminal trial.⁶⁵ However, four months' observations of the operation of the proceedings suggest there are substantial differences between the two proceedings. The dominant features of the disciplinary proceedings were that there was a general presumption of guilt as opposed to a presumption of innocence; a confusion of the issue of guilt or innocence and that of appropriate disposition; a reliance on informal discussion concerning these issues, much of it based on hearsay and rumour carried on out of the presence of the inmate accused, and a lack of concern for uniformity of sentences for offenses of similar nature.⁶⁶

These features are clearly contrary to the model of the regular criminal trial process. This divergence can be traced to very different assumptions which seem to underlie the regular criminal justice system and the disciplinary process in prison. In the regular criminal justice system, while the primary purpose is the prevention of crime, that purpose is tempered by substantive, procedural and evidentiary rules which seek to protect the individual from the state, to ensure that the values of freedom, autonomy and security are not submerged in pursuing the goal of crime control.⁶⁷ In the criminal justice system there is clear differentiation between the initial question of guilt and innocence and that of appropriate disposition. As to the first issue there is a presumption of innocence and a corresponding burden on the state to prove its case beyond a reasonable doubt; there are rules which require that evidence must not be second-hand to ensure its reliability and its accessibility to cross-examination in open court. There are other rules whose purpose is to avoid bias during the adjudication of guilt or innocence by excluding the admission of prior offenses except in certain cases. While

⁶⁵ The Canadian rules in fact go as far, in many respects, as what the most recent U.S. Federal Court decisions have required in the way of procedural due process for prison disciplinary proceeding under the 14th Amendment. See *Landman v. Royster* 333 F. Supp. 621 (1971); *Bundy v. Cannon* 328 F. Supp. 165 (1971); *Clutchette v. Procutner* 328 F. Supp. 767 (1971); *Morris v. Travisono* 310 F. Supp. 857 (1970); cf. *Soster v. McGinnis* 442 F. 2d 178 (1971). See generally M. Millemann, *Prison Disciplinary Hearings and Procedural Due Process* (1971), 31 Md.L.Rev. 27, P. Kraft, *Prison Disciplinary Priorities and Procedures, Is Due Process Provided* (1970), 47 N.D.L. Rev. 9; B. R. Jacobs, *Prison Discipline and Inmate Rights* (1970), 5 Harv. Civ. Lib. Rev. 227.

⁶⁶ Most of these features were also observed in another recent empirical study of disciplinary proceedings conducted by the Harvard Center for Criminal Justice at an American prison. This study was designed to monitor the impact of the *Morris v. Travisono* decision, *supra*, within Rhode Island's prison. That decision established due process procedures for disciplinary and related decisions. Since my study at this point has a similar focus to the Harvard one — an assessment of the impact of procedural rules on actual decision-making — I will compare my findings with those of the Harvard study wherever possible. This I feel is important since it will enable the reader to better assess whether my findings reflect the underlying reality of prison justice as opposed to being the observations of a biased reporter. See Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline* (1972), 63 J.Cr.L. Crim.&Pol. Sc. 200 (hereinafter referred to as "the Harvard Study").

⁶⁷ See generally Packer, *supra*, note 19.

in relation to the question of appropriate disposition there is some relaxation in the rules of evidence, nevertheless, any conclusions either in the form of oral testimony or a pre-sentence report are available to all parties and can be the subject of cross-examination.

Turning to the disciplinary process we find the following statement as to the purpose of this process in the Commissioners Directives:

Disciplinary action of a corrective or preventative type must be based on a desire to promote and maintain a socially acceptable pattern of behaviour and conformity with the Canadian Penitentiary Service Rules and Regulations. Thorough understanding of the inmate and his circumstances is essential in order that disciplinary decisions affecting him may contribute to a harmonious personal and social adjustment.⁶⁸

To the extent that the disciplinary process is concerned with preventing certain kinds of unacceptable behaviour, its purpose is similar to that of the regular criminal law system, except that, as we have seen, the rules of unacceptable behaviour are wider than the rules of the Criminal Code. This statement of policy also gives a hint that the disciplinary process is viewed as part of the overall treatment of inmates and therefore is more concerned with the needs of the individual than is the regular criminal justice system.

In conversation with the author, the Superintendent of Matsqui articulated a philosophy linking his handling of disciplinary proceedings to the individualized treatment model he saw as underlying the overall rehabilitative plan of Matsqui. As he explained it, his purpose in the disciplinary proceedings was to force the inmate to accept responsibility for his own actions and to participate in the appropriate disposition to ensure better behaviour in future. He saw the regular criminal justice system, with its adversary process, its rules of evidence and its inevitable lawyers, as designed to enable criminals to evade responsibility for their actions by leaving it to the lawyers to fight the case. He was not prepared to perpetuate that process in the prison because inmates were past masters at what he called "the cops and robbers" game and he was determined not to get involved in that game since he saw it as unproductive in rehabilitative terms.

The effect of this kind of philosophy on the operation of the disciplinary hearing was to focus attention on the disposition of the case rather than the issue of guilt since by presuming guilt and minimizing any real issue as to innocence, the inmate is fairly effectively denied an opportunity to play the "cops and robbers" game. Thus the presumption of guilt, which is the dominant impression of the proceedings, is functionally related to the basic assumption behind the proceedings. Similarly, the relative lack of importance attached to the issue of guilt means that little weight is attached to procedural due process which is designed to give meaning to the presumption of innocence. It also follows from viewing the total proceedings as part of the treatment of the inmate that there is no need to make discriminations between using information for determination of guilt as opposed to the appro-

⁶⁸ Commissioner's Directive 300 April 4, 1972.

priate disposition.⁶⁹ Similarly, giving greater credence to the testimony of guards as opposed to those of inmates further undermines the likelihood of inmates entering into a game which they realize they are bound to lose in most cases. The disparity between the requirement of guards giving testimony under oath as opposed to the lack of such a requirement for inmates conveys this message and in fact the practice at Matsqui was invariably to require guards to testify under oath and equally invariably (with one exception in four months) never to give inmates the opportunity to so testify. It also follows from viewing disciplinary proceedings as part of an individualized treatment process that little concern be given to the uniformity of punishments, even though, because of the small number of participants in the decision-making process, this would be possible to a far greater degree than in judicial sentencing in the regular criminal justice system.

The effect of viewing the disciplinary proceedings as part of the treatment process is also seen quite clearly in the manner of representation before the Board. Standing Orders require that the inmate's counsellor attend the meeting. A few counsellors saw their function to be advocates for the inmate, but most saw their role not as an advocate but rather as an extra member of the Disciplinary Board, and as such they questioned the inmate about his behaviour and contributed in the informal discussion about the inmate with whatever information they had, whether it was positive or negative. Thus, they saw themselves as part of the treatment team making a decision about the inmate. This explains how counsellors were able to participate as actual members of the Disciplinary Board without any dissonance occurring in the perception of themselves as counsellors.⁷⁰

Also referable to the treatment assumptions of the disciplinary process at Matsqui was the non-compliance with the Divisional Instruction requirement that an inmate be provided with written notice of the charge and a

⁶⁹ A good example of this "discipline as treatment" syndrome, involving a confusion of the issues of guilt and disposition was the case where an inmate was charged with possession of contraband when he was found with a gun holster he had made during his hobby hours. (Contraband is defined as "Any article not issued, furnished or authorised." Div. I. 300.02, April 4, 1972). He gave evidence that he had made holsters on several previous occasions and no one had cautioned him or suggested that it was contraband, and that he had in fact sold a previous holster through the Institution's hobby shop. After the inmate had given his testimony he was asked to leave the room, as was the usual practice, and a discussion then ensued between the members of the Board, one of whom was in fact in charge of the hobby shop. The discussion was not limited to whether the possession of the holster was in fact authorized, and therefore not contraband, but included a discussion on the inmate's general behaviour in the institution indicating that he was a very good worker and had not been in trouble before. When the inmate was brought back into the room he was told that the Board had considered everything, including his good work and trouble-free record and therefore found him not guilty. I was left with the distinct feeling that had it not been for the work record he would have been found guilty even though if the facts were as he stated them, and there was no testimony to the contrary, he clearly was not in possession of contraband.

⁷⁰ In one case where the hearing was remanded the inmate's counsellor sat as a member of the Disciplinary Board on the first hearing and as the inmate's representative at the second without any real change in posture.

summary of the evidence alleged against him, something which was never done during the period of study. The practice at Matsqui was that inmates were usually told of their impending appearance in Warden's Court on the morning of their appearance, on their way to work. Of course, in many cases they may already have been aware that a charge had been laid against them because either the guard who laid the charge or their counsellor had informed them. However it was at the hearing itself that the evidence against the inmate was presented and in no cases we observed was any prior written summary of such evidence given. While this is not to suggest that there was a conscious policy not to comply with the Divisional Instructions, it is clear that, given the treatment premise outlined above, no one would think that non-compliance was a bad fault in the system him, because if the inmate is not aware of the evidence that will be given against, he clearly is not in a good position to make up a story to give to the Board, and therefore, once again, he is less able to play the "cops and robbers" game.

While certain aspects of the disciplinary procedure are referable to the assumption that the disciplinary process is part of the treatment process, there are also other possible explanations. Most important is the desire for efficient handling of cases; presuming guilt and admitting any evidence, whatever its source, is consistent not only with an attempt to get the whole story in order to make a proper treatment decision, but also with the most efficient way to handle a trial when certainty of conviction and minimum expenditure of time are important considerations. Also the preference for guard testimony as opposed to inmate testimony can be viewed as a necessary decision from the administration's point of view to uphold the morale and integrity of the custody staff.⁷¹ Again, both the presumption of guilt and the reliance on custody staff testimony may be based on a real feeling of those on the Disciplinary Board that guards do not falsely accuse inmates and do not tell lies, so that the due process rules lawyers have developed for the criminal trial to test reliability and truthfulness of testimony are not applicable and have no legitimacy in disciplinary proceedings in prison.⁷²

It is important to consider these alternative bases for the way disciplinary proceedings are handled in Matsqui, which clearly have little in common with the treatment premise articulated by the Superintendent, be-

⁷¹ The Harvard Study felt that preservation of staff morale, especially custodial staff morale, was the primary reason for the Disciplinary Board treating disciplinary hearings as substantially dispositional in nature (i.e. presuming guilt) and for the operating "presumption of credibility" in favour of guards and against the inmate. *Supra*, note 66 at 223. This primary role was also reflected in the Harvard Study by the additional fact that 39% of disciplinary incidents in their sample involved trouble with guards or staff or refusal to obey prison personnel. While maintenance of morale is clearly an important factor at Matsqui, its primacy is less clear in light of the treatment orientation of the institution, an orientation which the prison in the Harvard Study did not appear to have. Its less than primary role may be reflected in the fact that during the years 1969-72 only between 20-25% of disciplinary incidents involved refusing orders or disrespectful or threatening conduct towards guards.

⁷² Thus in one case where an inmate asked that a written incident report be substantiated by the guard's oral testimony, one of the members of the Board replied "Knowing [the guard] as I do, I know that this report is true, because in no way would he tell a lie."

cause it is the writer's view that there was a real difference of philosophy depending upon who presided over the Disciplinary Board. Thus from conversations with the Assistant Deputy Director of Security and from observing him when presiding over the Board, it was clear to me that his view of the purpose of the proceedings was to punish an inmate for having violated the rule, to deter him and others from doing the same thing.⁷³ Even when the Superintendent was presiding, it is clear that his view of the disciplinary proceedings as treatment was only imperfectly realised, since for certain offenses there is an automatic sanction which is clearly incompatible with individualized treatment. Thus for the use of drugs, 30 days loss of statutory remission was almost invariably imposed, no matter what the particular position or circumstances of the inmate might be, premised on the need to control and deter drug use.⁷⁴ This means that the inmate is dealt with within a procedural context premised on his being treated, whereas the reality as seen by some of those administering the process (and the inmate) is that he is being punished, a situation which has become familiar to students of the rehabilitative ideal in action.⁷⁵

To a lawyer accustomed to thinking that procedural due process is a necessary prerequisite to a fair trial, it might seem to be an inevitable conclusion from the preceding analysis that the prison disciplinary process at Matsqui operates unfairly. However it is necessary to check this lawyer's

⁷³ This difference in philosophy is supported by the sentencing behaviour of the Disciplinary Board. During the period when the A/D/D(S) was presiding over the Board, greater use was made of the sanction of punitive segregation. The regular advisors to the Board during this period were a senior custody officer and an inmate counsellor. In their recommendations as to sentence I found that the counsellor usually took the most lenient view and the senior custody officer took a harder line, particularly when it came to such sanctions as punitive segregation and loss of statutory remission. That these differences in sentencing behaviour are related to different philosophies of sentencing is given strong support by recent research into sentencing behaviour. John Hogarth found significant differences of attitudes related to crime and punishment between, *inter alia*, police officers and probation officers. He also found that magistrates' attitudes on these matters were significantly related to their sentencing behaviour. See *supra*, note 4.

⁷⁴ In one of the rare cases where this did not happen the inmate had pleaded not guilty to using barbiturates while on a temporary absence pass. He stated that he had never used barbiturates and that his problem had always been alcohol. He further stated that during the temporary absence he had been at a halfway house and would not jeopardize his chances of going out again. Two members of the Board (and the writer) were inclined to believe the inmate, due both to his previous drug free record and his genuine bewilderment at the positive urine test. However, the Board felt bound to uphold the test and were not prepared to admit that there was a mistake for fear of setting a precedent. He was found guilty, but only given a suspended sentence of 10 days dissociation. The Board also stated that the finding of guilty was not to affect the inmate's grading and a majority felt that it should not affect his earned remission for that month. It is clear in other words that the deviation from the standard punishment in this case was because the Board felt the inmate was innocent.

⁷⁵ This discrepancy between reality and rhetoric was made quite explicit in one case where an inmate was sentenced to the usual 30 day loss of statutory remission for using drugs and expelled from the pre-release program. The inmate protested that he had only two positive drug samples since coming to the Institution and this was his first in pre-release and that other inmates had not been thrown out of pre-release after their first positive sample. The Superintendent replied "It's about time then I made an example of someone and you are it".

reflex which assumes that there is only one way to ensure a fair trial. Does the disciplinary process in Matsqui in fact operate unfairly? Certainly the inmates we talked to, almost to a man, felt that Warden's Court was a kangaroo court, that they were automatically guilty notwithstanding anything they said, and that the whole thing was somewhat of a farce. That they felt this way is obviously of great importance in terms of their accepting the legitimacy of their treatment or punishment, but might not their view be based upon an outdated perception of Warden's Court? From all accounts, both of guards and inmates, Warden's Court used to be run like a kangaroo court. However, in recent years, Divisional Instructions have sought to bring some procedural regularity to the handling of discipline, and while they are not all observed at Matsqui, do inmates see the operation of Warden's Court through a rear view mirror or is their feeling of its basic unfairness justified?

Before answering this question it should be observed that a large percentage of cases coming before Warden's Court (approximately 80%) involve guilty pleas so it might be argued that at least in the cases disposed of by the court in this way, any basic unfairness in the procedure is non-operative. Such an argument is not really tenable since inmates related that there was no point in pleading not guilty when they would inevitably be found guilty. In other words, if there is unfairness in the procedure, guilty pleas may be simply the cynical response of inmates who see no point in pleading otherwise.

Speaking generally, it seemed that in most cases where an inmate pleaded not guilty, the Disciplinary Board arrived at at what this observer thought was the proper verdict on the issue of guilt or innocence. However, in a number of cases where the Board convicted, I was left in considerable doubt as to the inmate's guilt and would have acquitted, had the standard of proof been the normal criminal one of beyond a reasonable doubt. Since these cases tended to be the more serious ones and they illustrate something about the operation of the disciplinary proceedings, I intend to go into one of them in more detail. Before doing so, I must state that in almost all cases where a not guilty plea was entered, if I were the inmate, I would have felt that the proceedings were unfair. It is of course necessary to resolve this apparent contradiction between my perception as an observer and my perception as an inmate. The perception of unfairness flows from two main features of the process; the first being the nature in which the decision was reached and secondly, the composition of the group who made the decision.

As to the first, it was standard procedure at Matsqui that after a plea had been entered and any evidence, either from the inmate or guards, had been given, the inmate would then be asked to withdraw from the room. The person presiding over the Disciplinary Board would then ask his advisors what they thought about the matter and it was at this point that a good amount of information was shared about the inmate. The information might range from the fact that the inmate had been reported associating with certain other inmates who were suspected of trafficking in drugs to his having recently received unsatisfactory work reports. There was also other information of a more positive kind such as the fact that the inmate had not been in trouble before, was working well, and was participating in his counselling group.

This informal exchange of information is clearly premised on the need to know as much as possible about the inmate to ensure that the correct decision is reached. Without a clear separation of the issue of guilt and that of disposition, there is a real danger that information relevant to the latter issue may be used to the prejudice of the inmate on the former, but quite apart from possible prejudicial effects caused by lack of separation of distinct issues, there is the further danger that the information, which is often based on the reports of guards or work instructors and even other inmates, may not be reliable. In any event, the inmate himself is not given any opportunity to hear and to rebut the allegations about him. From the inmate's point of view whether or not the result is an unfair decision, the whole proceeding appears unfair by virtue of the very basic fact that justice has not been seen to be done. There is also the further point that it is impossible to say in these circumstances that the inmate has had an opportunity to make a full answer and defence to the charge as required by the Directives.

Are there any justifications for the practice of information sharing out of earshot of the inmate based on the fact that the proceedings are taking place in the prison setting? There may be a need to maintain the confidentiality of certain information for security reasons. For example, on a number of occasions an inmate appearing before the Board was in the very near future to be transferred back to the B.C. Penitentiary, and the Board was informed or reminded of this. Since the usual practice at Matsqui is not to inform inmates of their transfer until the last moment (a practice which will be commented on later) it was clearly legitimate for this information to be given with the inmate out of the room. The confidentiality of information could also be justified in appropriate cases on the basis that disclosure would compromise the informant. This might be the case where the information was obtained from an inmate informer but could also apply where the information was obtained from an otherwise confidential source such as a psychologist's report.⁷⁰

While recognising therefore that there are legitimate interests justifying confidentiality, it was my view based upon the four months observation, that

⁷⁰ A very good example of the institution's interest in the confidentiality of information, the disclosure of which would have both compromised a member of the institutional staff and might have been contrary to the inmate's best interest, was a case I observed where an inmate had been charged with possession of a contraband knife. This was a very serious charge and the inmate had a record of assaultive behaviour involving a knife. While the inmate was out of the room one of the guards present mentioned that this inmate was being subjected to what he thought was homosexual pressure by other inmates, and that in light of his small stature it was highly likely that he had fashioned the knife, which was of the defensive kind, as a means of protecting himself. While not providing a defense, this information put the whole matter of appropriate sentence in a very different light. When the inmate was called back into the room he was asked in a rather gingerly manner whether anyone was putting any pressure on him, he declined to comment and it was quite clear that he did not want to talk about what was happening whether from fear of retaliation or otherwise. If he had been present when this information was given he might have been acutely embarrassed and might have developed feelings of hostility towards the guard giving the information. Alternatively, and more likely, had he been present, the information might not have been offered which would have certainly resulted in an increased sentence.

in the great majority of cases where information was exchanged out of earshot of the inmate, there was no such interest at stake. Permitting the inmate to be present would have had the probable effect of lengthening some of the proceedings, due to the inmate's response to allegations made about him, but this seems to be a very minor cost in light of the benefit of having justice seem to be done. Also, since in many cases the information given was positive or favourable to the inmate, allowing the inmate to hear it would permit the Board to clearly demonstrate that it is just not concerned with negative features of an inmate's conduct in dealing with a disciplinary problem.

The second feature of the disciplinary process which results in unfairness is the composition of the Disciplinary Board. As previously stated, the Board was usually presided over by the Superintendent of the Institution assisted by the A/D/D(S) and a counsellor. The Superintendent at Matsqui during the period of study had been at the institution since its opening in 1966 and had a wide knowledge of inmate behaviour within the institution. The A/D/D(S) had been in the penitentiary service for some 30 years and since he was for many years a guard at the B.C. Penitentiary he had had extensive dealings with many of the inmates coming before the Disciplinary Board, particularly those who have done several terms in the penitentiary. The extensive knowledge possessed by the Superintendent and the A/D/D(S) meant that there were few inmates coming before the Board who were not familiar to those adjudicating the case. Also the A/D/D(S) was continually receiving reports from guards as to movements and activities in the prison and therefore was likely to have current information on any particular inmate who has been involved in any unusual occurrence. From the perspective of the treatment premise of disciplinary proceedings, this extensive knowledge by the decision makers is of course a valued thing, since it enables them to make informed sentencing decisions. However, it also means that on the adjudication of the issue whether an inmate has committed the particular offense with which he is charged, the decision maker is biased either because of his previous dealings with the inmate or because of special knowledge which he has received about the inmate outside the confines of the hearing, and perhaps unrelated to the offense itself. It was not uncommon to find one of the members of the Board saying "I know this inmate from back in the Pen and he is always getting into this kind of trouble." It is difficult to see how the inmate can be given a fair hearing on the particular issue before the court when one or more of the decision makers has that kind of preconceived notion about the inmate's propensity to commit violations.⁷⁷

During the period of the study a further bias was seen creeping into the proceedings. Usually the composition of the Disciplinary Board ensured a fairly broad representation of interests, that of security as represented by the

⁷⁷ The Harvard Study also noted the inevitable cloud on impartiality caused by prior knowledge and familiarity with the inmate reviewed. They concluded that "The result often is that the disciplinary decision is made on the basis of the personal and usually unarticulated feelings of a staff member, rather than on the facts presented at the hearing." *Supra*, note 66 at 210.

A/D/D(S), that of inmate treatment as represented by the counsellor, and that of good administration and overall functioning of the institution as represented by the Superintendent. However, for part of the observation period the Board was presided over by the A/D/D(S) with the assistance of a senior custody officer and a counsellor. This meant that a majority of the Board represented security interests, a bias which became particularly evident in a number of instances where the charge against the inmate was one affecting predominantly those interests. Let me make it quite clear that I am not saying that the A/D/D(S) or the senior custody officer acted in an arbitrary way. However, the fact that they had very real biases based on their roles in the institution, in my judgment, adversely affects the chances of an inmate getting a fair hearing. Where disciplinary proceedings are controlled or unduly influenced by considerations of security or therapy, due process tends to fall by the wayside.

A Case Study in the Administration of Prison Justice

The thrust of what I have been saying is that in proceedings before the Disciplinary Board as presently conducted there is not the appearance of justice. While in most cases I felt that the Board, despite appearances, reached the correct conclusion as to guilt, in some I had a reasonable doubt as to the inmate's guilt and felt that the Board's decision resulted in an injustice to the inmate. At this point I propose to go into one such case in depth because it illustrates better than anything else how disciplinary proceedings are conducted and also provides an opportunity to both look at the different assumptions made in those proceedings from those made in a criminal trial, and to analyse whether the issues involved justify a different procedure in prison from that used in the regular criminal justice system.

The case involved a charge of attempted escape under Penitentiary Regulations 2.29(1). The Disciplinary Board was presided over by the A/D/D(S) assisted by the Supervisor of Classification and a senior custody officer. The case arose out of an incident which occurred at 1:45 a.m., when the nurse on duty in the hospital heard a noise and checked out the room where Smith and Jones were supposed to be sleeping, and found Jones out of the window, standing on the ledge, and Smith hurriedly getting back to his bed.⁷⁸ Both Jones and Smith were charged with attempted escape. Smith appeared in court first and pleaded not guilty. The following is taken from the notes of evidence made by my research assistant:

CHAIRMAN: Do you have an explanation?

SMITH: Well early in the day we noticed that one of the screens in the window had a rip in it and another one was coming away from the window. We figured that we'd get a beef about it so we talked about getting it fixed. That night Jones crawled out to replace the broken screen with a screen from the window in the room next door. [In order to understand the testimony it should be explained that on each window in the hospital there is a wire screen which permits the entry of air while preventing inmate exit out of the window. On the other side of the screen there is a ledge which runs

⁷⁸ The names of the inmates involved have of course been changed.

along the outside of the building. The ledge is about two feet wide and is enclosed by concrete bars so that an inmate who took off the screen would still be prevented from getting into the prison grounds by the concrete bars. However, he is able to walk along the ledge to the next room and by removing the screen from that window he could gain entry to that next room and from there into the corridor.] I was in bed sleeping and I heard my name being called, I got up and went over to the window and saw Jones out there on the ledge. He wanted me to help him. Then the nurse came in . . . I realized the position I was in so I hopped back to my bed.

Mrs. Bone, the nurse from the hospital, was then called as a witness and sworn in. The Chairman asked her to read her statement.

MRS. BONE: Early in the evening I had heard a noise and at that time Jones and Smith were in bed but not asleep. At 1:45 a.m. I heard the noise again so I went to their room. Smith was at the window and he raced nimbly back to bed and called Jones. Jones came through the window and jumped into his bed. Then he got up, washed his hands and got back into bed. Whatever Smith was going to do he hadn't done it yet but he certainly was involved.

The Chairman then asked Smith if he had any questions of the witness. Smith started explaining what happened but the Chairman interrupted saying that he could make a statement later. A guard was then sworn in as a witness and his testimony was that he was notified that something was wrong at the hospital and raced over to the hospital with the senior security officer on duty (who was sitting as an advisor to the Disciplinary Board). He questioned the two inmates who denied being up to anything and they were taken up to the segregation unit. He further testified that the screen was off the window. The Chairman then asked Smith whether there was any questions of this witness.

SMITH: There was no attempted escape.

CHAIRMAN: Now I am forced to call the works officer and see why the windows are in so bad a state of repair at the hospital.

SMITH: It was that way.

ADVISOR TO THE BOARD: How many screens?

SMITH: Two. One with the rip and one pretty well off the window.

ADVISOR: Did you wash sweat off your hands?

SMITH: No, that was Jones.

SECOND ADVISOR: Did you report the screens to the nurse?

SMITH: No, I don't care if the whole hospital falls down. That's the way I feel I deny having anything to do with the window, I was just out of bed.

FIRST ADVISOR: What were you wearing?

SMITH: Pyjamas.

CHAIRMAN: I have a report from the Yard Officer that the screen wasn't out of place at the first tour but was at the second tour.

SMITH: I wasn't trying to fix the window. I was just called and got out of bed. Jones said, "Give me a hand" and then Mrs. Bone came in.

FIRST ADVISOR: Were you prepared to give him a hand?

SMITH: Yes, but the nurse came in and I was only out of bed about 8 seconds.

FIRST ADVISOR: You were in the hospital for back trouble yet you moved pretty nimbly.

SMITH: If I wanted to escape I could get away from better places than the hospital.

The inmate was then sent out of the room.

SMITH'S COUNSELLOR: I don't know if Smith was involved — he might have been if he had more time.

CHAIRMAN: He's a Grade 1 inmate. He failed earned remission in January, February, and March. He was in court for a contraband letter last week.

SMITH'S COUNSELLOR: He didn't earn remission in those months because he was AWOL. He went AWOL when the Pilot Treatment Unit closed down. He has a name as a rat and was watched over by an older guy. That guy has been shipped back to the B.C. Pen. Now it's dangerous for Smith. He was safe in the P.T.U. but when it was closed he was scared of being placed back in the general population.⁷⁹

FIRST ADVISOR: An innocent man doesn't leap into bed, but still what have we proven?

SMITH'S COUNSELLOR: We have circumstantial evidence that something was going on. I would have moved pretty fast too. Was he running because of guilt or fright?

FIRST ADVISOR: I think it was guilt but we can't prove it.

SECOND ADVISOR: He has an escape on his record.

CHAIRMAN: There will be no formal decision from the Second Advisor because he was the Keeper that night and was involved in the episode. We should consider the time of night, the type of individual Smith was involved with, and the fact that the innocent bystander story isn't acceptable. Another 15 minutes and they would have been gone. That's my version of it.

FIRST ADVISOR: He was attempting to commit an offence. He was out of a lawful area without permission. He appeared guilty whether he was or not. The charge should have been under subsection (k) — doing an act calculated to prejudice the discipline or good order of the institution. But we can't prove that he is guilty of attempted escape.

CHAIRMAN: Do you want to hear Jones before deciding?

FIRST ADVISOR: Yes.

Jones was then brought in. At this point Jones' counsellor came into the room and explained that he was holding a group meeting and could someone else take care of Jones. No one else was there in lieu of Jones' counsellor. The charge was then read out to Jones and he pleaded not guilty.

CHAIRMAN: Do you have an explanation?

JONES: I've done too much time to try and escape. I've only 12 or 13 months left. Besides I couldn't escape from there anyhow. I was just trying to change the screen in our window with a screen from the next window. I took it off the next window but it wouldn't fit right, I heard the guard and then I called Smith.

CHAIRMAN: You were doing all this at 1:45 a.m.

JONES: I have been lying in the hospital for 3 weeks, sleeping half the time. It was just something to do.

CHAIRMAN: If there was a broken screen, why didn't you report it?

⁷⁹ The P.T.U. was a special unit (no longer in existence at the time of this study) dealing mainly with drug addicts in an intensive counselling setting.

JONES: It didn't dawn on me to report it. Anyway I've been there three weeks and I'd get the beef for it.

Mrs. Bone was then called as a witness and read out her statement again.

CHAIRMAN: Any questions of the witness?

Jones attempted to elaborate on his statement and was stopped short by the Chairman and told that he could give his explanation later. He was asked again if he had any questions and replied in the negative.

SMITH'S COUNSELLOR: Was the blind on the window down?

MRS. BONE: Yes.

SMITH'S COUNSELLOR: So Jones was behind the closed blind?

The guard was called in and gave the same evidence as he had given before.

JONES: (to guard) Is there anywhere to go if you take off the screen?

GUARD: No. It just gives access to the next room.

JONES: I could get in there anyway . . . I guess I should have reported it.

CHAIRMAN: I can call the Works Officer and get a report on the screen.

FIRST ADVISOR: If you were attempting to escape there was a light screen and a heavy concrete barrier. You would have to go through the screen first, right?

JONES: Yes, if I had a jackhammer to get through the concrete.

SMITH'S COUNSELLOR: Why was the blind down?

JONES: It's a venetian blind. It was down all day and night.

SECOND ADVISOR: Was the other window screen loose?

JONES: No.

CHAIRMAN: If it had been later in the night you wouldn't be here now.

JONES: Yes.

Jones was then sent out of the room.

CHAIRMAN: There is the whole sordid mess . . . Jones was in with me in the B.C. Penitentiary 10 years ago. Let me sum it all up. I'm not too worried about the jackhammer he didn't have. He could have got into the rest of the hospital from the room next door and there was a female staff member on. He could have got control of the hospital.

M. JACKSON: Would he have access to drugs if he got into the other room and out into the corridor?

SECOND ADVISOR: If he got the key from Mrs. Bone he could have.

CHAIRMAN: I don't think he was interested in acquiring drugs.

M. JACKSON: Are the two men friends outside the hospital?

SMITH'S COUNSELLOR: No, there is no association between them in the general population.

CHAIRMAN: From the security standpoint this situation was bad. Mrs. Bone wouldn't be primarily considering security but she was still right on top of it. I hesitate to think what might have happened if they had gotten into the corridor.

SMITH'S COUNSELLOR: It looks more and more suspicious.

CHAIRMAN: And it's not a normal thing to be up at 1:45 a.m.

SMITH'S COUNSELLOR: There doesn't seem to be much doubt about him, does there?

CHAIRMAN: Smith could have ignored the plea for assistance from Jones. However he did appear on the scene. There is some measure of co-involvement. They have been given ample opportunity to question the evidence and they haven't done so favourably. In my opinion both of them should be found guilty.

FIRST ADVISOR: Agreed. How about 10 days S.C.U.⁸⁰

SECOND ADVISOR: Yes.

CHAIRMAN: All right.

Smith is brought into the room.

CHAIRMAN: You have been found guilty and we sentence you to 10 days S.C.U.

Jones is brought in.

CHAIRMAN: You had ample opportunity to cross-examine the witnesses. We have considered your explanation very thoroughly and we have found you guilty. You are sentenced to 10 days in S.C.U.

JONES: I don't want this attempted escape on my record. I have been in this place 5 times and I have never tried to escape. Guys get 5 hot tests and all they get is a lousy loss of copper [statutory remission]. They never see S.C.U.

Let us consider how the Smith-Jones trial would have been dealt with in outside court. Such an enquiry is particularly appropriate in this case, since a charge of attempted escape could have been laid in outside court under the Criminal Code.

In this Disciplinary Board proceedings the inmates were charged separately and the original intention of the Board seemed to be to hear the charges individually since the two inmates were never before the Board at the same time at any point in the proceedings. However, the result of withholding a decision on Smith until the case against Jones had been heard was to create in effect a joint trial. It is highly likely that had the charge been laid in outside court the inmates would have been charged jointly on the basis that they were involved in a joint enterprise. However counsel for Smith could apply for severance on the basis of one of the five grounds set out in *R. v. Weir*⁸¹ in that "one of the defendants could give evidence for all or some of the other defendants and would become competent and compellable on the separate trials of such other defendants".⁸² The case against Smith was very weak and defense counsel could be expected to argue that no matter what Jones was doing Smith's only involvement was in answering a call for help from Jones. Counsel would argue in the application for severance that he wanted to call Jones as a witness as an essential part of

⁸⁰ S.C.U. is the Special Correctional Unit where sentences of dissociation are carried out.

⁸¹ (1899) 3, C.C.C. 351.

⁸² *Id.* at 353.

Smith's defense. No doubt Jones would repeat the evidence he gave before the Disciplinary Board that he was out the window by himself and only called Smith when he heard a guard and wanted help coming back through the window. Jones however might not be willing to testify and indeed couldn't be compelled to testify if he and Smith had joint trials since anything he said would be admissible against him as well. However with separate trials Jones could be compelled to testify.

It is quite possible that a Judge would grant severance on the basis of this argument and it is suggested that in a separate trial there is no doubt that Smith would have been acquitted. The evidence against him was that he was out of bed and Jones' evidence would exonerate him from any involvement in whatever activities were going on outside the window. On a separate trial it is likely that defense counsel would not have put Smith on the stand because of his escape record which no doubt would have been put to him by Crown counsel. The evidence against him however is so weak that his failure to testify would be unlikely to affect the result.

Suppose, however, the application for severance was not granted and the inmates were tried jointly in outside court. In such a trial the Judge would have had uppermost in his mind the evidentiary rule that evidence against one accused is not admissible as evidence against the other, unless a common design has been established between the parties. Only if such common design is established by other evidence would acts or declarations by one party, which are in persuance or furtherance of such common design, be evidence against the other.⁸³ It is suggested that a failure of the Board to be aware of this vital principle resulted in Smith being convicted on evidence which was evidence in fact only against Jones.

Crown counsel would no doubt try and establish that Smith and Jones in fact were involved in the joint enterprise or common design of attempting escape. However defense counsel would be able to show that there was no such common design. First of all, Smith and Jones were together in the room at 1:45 in the morning not by choice but because they were both inmates in need of medical care and had by chance been assigned to the same hospital room; it was in no way a natural coming together. In addition, there was no evidence that they were friends; indeed the Board was told that they did not associate with one another in the general population. On the basis of this analysis, the evidence against Jones should not have been considered in relation to Smith, yet there is no doubt from the transcript that it was this evidence which convicted Smith.

Was the evidence which was properly admissible against Smith sufficient to warrant his conviction? That evidence was that he was seen by the nurse out of his bed wearing his pyjamas and standing by the window at 1:45, and that on seeing the nurse he ran back to his bed. This evidence is purely circumstantial and if the case were being tried in a court of law it has long been established under the rule in *Hodge's Case*,⁸⁴ that where evidence

⁸³ See *R. v. Langs*, [1943] 3 D.L.R. 434; *R. v. Gagnon*, [1956] S.C.R. 635.

⁸⁴ (1832) 168 E.R. 1136.

is circumstantial, the court must be satisfied not only that the circumstances proved are consistent with the guilt of the accused but also that they are inconsistent with any other rational conclusion. The explanation which was given by both inmates, that Smith was sleeping, was awakened by his name being called by Jones, and got out of the bed to see what Jones wanted, is a rational conclusion quite consistent with the evidence presented against Smith. Even the Board, before hearing Jones' case, seemed to agree with this. In the discussion of whether Smith ran back to his bed because of "guilt or fright" one of the advisors stated, "I think it was guilt but I can't prove it", thus admitting that another rational explanation for Smith's behaviour was fear. In addition, the same advisor also concluded that while he appeared guilty "we can't prove that he's guilty of attempting escape". There seems little doubt therefore that this evidence would have not been sufficient to convict Smith in a trial in outside court.

There is another basis for suggesting that Smith would have been acquitted in an outside trial. This arises not so much from the nature of the proceedings as from the definition of the offence of attempt under section 24 of the Criminal Code, which requires in addition to an intent to commit an offence an act beyond mere preparation in the commission of the offence. There is no single test of when an act goes beyond mere preparation but application of the various formulae which the courts have developed indicates that Smith would not be found guilty of attempting to escape. His actions of being out of bed and running back to bed on being disturbed by the nurse are not unequivocally referable to an intention to escape⁸⁵ and it would be difficult to argue that his actions fell within the "last step" test of proximity under which the accused's act must be the last one performed prior to his committing the offense.⁸⁶ Being out of bed is clearly referable to something other than an intention to escape, (for example, curiosity as to why Jones was outside the window), and his act of being by the window was far from being the last act prior to the escape, since he would have to go through the window, along the ledge, through the window in the next room and out into the corridor. However, in the proceedings before the Disciplinary Board there was no criteria for deciding what was an attempt and hence no basis against which to test the evidence presented in any coherent way.

Thus far we have been concerned with illustrating the insufficiency of the evidence against Smith. The case against Jones is certainly stronger. He was outside the window of his hospital room at 1:45 in the morning which is certainly consistent with an attempt to escape, and his alternative explanation that he was seeking to repair the window screen seems initially no more likely to be believed were it presented in a court of law than it was when presented before the Disciplinary Board. However, placing myself in the position of defense counsel and based on conversations with Jones outside the courtroom, supplemented by my own inquiries and observations at the scene of the crime, leads me to believe that Jones may well have been able to establish a successful defense. Jones' story that a screen was ripped

⁸⁵ *R. v. Barker*, [1924] 43 N.Z.L.R. 865.

⁸⁶ *R. v. Courtemanche and Bazinet* (1970), 9 C.R.N.S.

and in need of repair and that he was afraid of reporting it lest it be thought that he had broken it seemed to me, at first, to be rather farfetched. However, when I went over to the hospital and examined the room in question, I found in fact that the screen was ripped and also, to my surprise, that it was still unattached to the window and was laying against the concrete bars outside the window. This was surprising because during the hearing the Chairman had suggested that if any screen had been broken, as Jones alleged, it would have been noticed by guards and repaired and yet, several days after it was clearly known to be broken, it was still laying unrepaired and unfixed to the window. During the course of the hearing the Chairman had stated on two separate occasions that if the inmates persisted with their story he would be forced to call the Works Officer to testify as to the condition of the screens. In light of my investigations, it is likely that if the officer had testified and had been cross-examined properly he would have done little to discredit Jones' story. Also in my conversations with Jones, after the hearing, at a time when he was not under any pressure and could therefore take his time over telling his story, he explained that it was ridiculous to suggest that he was trying to escape by going through the window in the room next door and then out on to the corridor, because that would not have gotten him anywhere, since the front door to the hospital was always locked. He also stated that he could get out into the corridor at any time simply by calling the nurse and asking to use the bathroom. On talking to the nurse about this she explained that she thought that Jones' intention was to get into the corridor undetected and then into the mens' washroom and wait for an opportunity to get out of the main door when one of the guards came in. She explained that while usually the guard on his tour of inspection would open the hospital door and then lock it behind him before coming up to her post to ensure that everything was in order, sometimes he did not do so. Jones might have been taking the chance that the next time the guard came up he would forget to lock the door. On raising this with Jones he dismissed it as being absurd, since he was almost bound to get caught if the door was not unlocked, and he explained that there were so many other ways of getting out of Matsqui undetected that the method which he was accused of was simply not the way he would go about escaping. The combination of the unlikelihood of Jones escaping successfully through the method the Board suggested he was going to use, plus the fact that the screen was broken in the way Jones suggested and nothing had been done by the ground staff to repair it even though a week had gone by since its discovery, raised in my mind a reasonable doubt as to Jones' guilt of the offense charged.

The hearing before the Disciplinary Board in this case suffered from a basic failure to separate the involvement of the two accused through a careful scrutiny of the evidence and also from a lack of any real definition of what the ingredients of the offense were. It is precisely these kinds of defects which a trial in a court of law, with the rules of evidence and adequate representation before a judge, is designed to avoid.

The Smith-Jones case also clearly illustrates that a Disciplinary Board with a majority of members drawn from a custody background will have a

very definite bias in favour of protecting security interests. Thus it is not certain that, even if I had been able to participate fully in this proceeding and had acted as defense counsel and made certain submissions concerning the insufficiency of evidence against Smith, this would have been persuasive in light of a Board which genuinely saw escape in every move of the two accused.

The final comment on this case relates to a matter not apparent on the face of the transcript, although the reader is given a clue in Jones' final words where he stated that he did not want the attempted escape on his record. His concern was well-founded since the true seriousness of the charge is reflected not only in the formal sentence of the Disciplinary Board but in the informal consequences of such a conviction. Thus, as an attempted escapee Jones would at best be transferred to a work assignment which ensured his close observation and at worst be transferred back to maximum security in the B.C. Pen, would be automatically precluded from consideration for a temporary absence pass and would have his chances for a parole substantially diminished. To ensure that his escape attempt did not go unnoticed "ESCAPER" would be stamped on the front cover of his institutional file. In addition Jones would lose his three days earned remission for the month. While the informal consequences are particularly dramatic and visible in this case, such consequences are an inherent part of the formal disciplinary proceedings, since the inmates disciplinary record is a significant factor in making any important decisions about him. These consequences are not always readily discerned. In a serious case such as this some of them (e.g. change in work assignment and no temporary absence passes) seem perhaps obvious since they relate to a need for increased security, but since both a change in work assignment and temporary absence passes are privileges to be earned, relatively minor infractions may also jeopardize such privileges. Again a relatively minor charge, if it relates to refusal to accept the demands of a guard or counsellor may be interpreted as evidence of a bad risk in accepting parole supervision. This is of some importance at Matsqui since some of the counsellors with a background in psychology were apt to piece together apparently small incidents as indicative of some basic psychopathology. Whether this was justifiable in light of their professional expertise is not the point in issue here but rather that the reader in assessing the seriousness of disciplinary cases in prison must be aware that as with a criminal conviction on the street the formal sentence of the Warden's Court is but one of a series of shock waves in the convicted man's life.

Sentencing and the Disciplinary Board

Thus far I have dealt only with the process involved in the determination of the issue of guilt or innocence. While the Board often blurred that issue with the determination of sentence it is necessary for the purposes of this analysis to consider sentencing separately. Both the Penitentiary Regulations and the Divisional Instructions deal specifically with the question of sentencing. They provide that where an inmate is convicted of a minor disciplinary offence the punishment shall consist of loss of privileges. For serious or flagrant offences the punishment may consist of forfeiture of statutory remission, dissociation for a period not to exceed thirty days with or without

a restricted diet or loss of privileges.⁸⁷ Previous Instructions defined "minor" and "serious" offences but in the current Instruction there is no such definition. The Disciplinary Board is also empowered under the Instruction dealing with inmate grading to recommend downgrading of an inmate and this was regularly done at Matsqui.⁸⁸ The Board also in all cases of charges involving destruction of property fined the inmate the cost of the property destroyed.⁸⁹

The Divisional Instructions make detailed reference to the punishment of dissociation — colloquially called "the hole". This is in fact the equivalent of being placed in a prison within the prison. At Matsqui the dissociation unit or Special Correctional Unit (S.C.U.) consists of a tier of cells the same size as the regular cells with a sink and toilet facilities. There is no radio as in a normal cell. Under the Directives, inmates are to be provided with a mattress, pillow and an adequate supply of bed clothing which is however to be removed during the day.⁹⁰ At Matsqui inmates in dissociation were not given a regular bed and mattress but instead a wooden board and a thin piece of foam. This does not seem to be in strict compliance with the Directives which do not authorise any deviation from the normal sleeping regime save that of removing mattress and bedding during the day. Prior to the current Directive, one of the sanctions which the Disciplinary Board could impose was that the inmate sleep on a bare board with no mattress. This is no longer authorized although there were complaints by inmates during the period of our study that they were made to sleep on a bare board. Under the Divisional Instructions an inmate in segregation is not to be deprived of correspondence, visiting or reading privileges unless he has been charged specifically and found guilty of the abuse of one or all of such privileges and a temporary deprivation of the same is part of the punishment awarded by the Disciplinary Board. Correspondence and reading privileges are however to be restricted to non-working hours.⁹¹ Visits to inmates in dissociation take

⁸⁷ Section 2.28(4) P.S.R.; Div. I. 300.01 para. 10.

⁸⁸ Divisional Instructions provide that the Grading Board in its quarterly review of the inmate's grade shall review disciplinary offences (Div. I. 325.02 1 June 1964). However because the Disciplinary Board regularly downgraded as part of its sentence and this recommendation was automatically accepted by the Grading Board, only exceptionally was the Grading Board involved in any review of its own of disciplinary offenses. This deference by the Grading Board is understandable since usually the Superintendent was the chairman of both Boards.

⁸⁹ This is not authorised by the present Divisional Instruction although Commissioner's Directives do set out procedures whereby the Institutional Head, after a finding by the Disciplinary Board that an inmate has damaged government property contrary to paragraph 2.29(c) of the Penitentiary Regulations, may forfeit the inmate's pay (C.D. 325, 10th Nov. 1972). The practice of the Board at Matsqui therefore was technically improper in light of the Divisional Instruction. Another apparent contravention of Divisional Instructions occurred in relation to the Board's power to impose the punishment of loss of privileges. The Instructions require that such loss shall be "for a stated period of time" (D.I. 300.01 10(c)(1)). However the Board regularly suspended privileges (e.g. temporary absence passes) 'indefinitely' which does not seem to this writer to meet either the wording of the Divisional Instruction or its purpose, which surely is to give the inmate notice of the limits of his punishment.

⁹⁰ D.I. 300.01 11(d).

⁹¹ *Id.* para. 11(i).

place behind a screen rather than in the open area usually reserved for visitors. At Matsqui, inmates undergoing punitive segregation were not permitted certain privileges, e.g. to purchase tobacco, although there is nothing in the Directives denying such privileges. Also, while Instructions provide that a restricted diet (the normal diet less desserts and/or jams) shall only be awarded to those who deliberately and maliciously waste food or, while under a sentence of dissociation, wilfully offend against good order,⁹² at Matsqui the practice was to give everyone in punitive dissociation a restricted diet.

The Divisional Instructions provide that every inmate under a sentence of dissociation shall be given at least one half hour of exercise of open air in the winter, and one hour in the summer, on every day when weather and other conditions permit.⁹³ However, during the summer of our study the inmates were rarely given even one half hour of exercise, and that was in an area measuring approximately 14 feet by 14 feet which was open to the sky with a wire grill covering it. Some days inmates were given no exercise at all on the basis that the limited number of staff did not permit this. The A/D/D(S) viewed the Directives as contemplating this possibility since it provided for exercise only so long as weather and "other conditions" permitted.

Although the Divisional Instructions state that even with dissociation arrangements may be made for the inmate to engage in as much of the normal program activity as is practical,⁹⁴ at Matsqui an inmate undergoing the punishment of dissociation did not participate in any of the institution's activities. He was not permitted to work, nor participate in any counselling activities and in fact, except for visits and the exercise period, he does not see anyone except for the guard who brings him his meals.

It should be quite obvious that the punishment of dissociation is substantial in terms of its drastic restrictions on the inmate's mobility, communication, and ability to occupy his time in work and other activity. During the summer when the inmates are free in the evening and weekends to exercise and play in the large recreation field behind the institution it is a particular deprivation. Apart from its physical effects, there is substantial psychiatric and psychological evidence documenting the debilitating effects of sensory deprivation and social isolation upon individuals.⁹⁵ That it is a

⁹² *Id.* para. 10(c)(iv).

⁹³ *Id.* para. 11(e).

⁹⁴ *Id.* para. 10(3).

⁹⁵ See the literature referred to in Note, *Solitary Confinement — Punishment with the Letter of the Law, or Psychological Torture?* (1972), Wisc. L. Rev. 222 at 223 notes 66-69. See also R. G. Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology"* (1970-71) 66 Iowa L. Rev. 1251; K. M. Cole, *Constitutional Status of Solitary Confinement* (1972) 57 Cornell L. Rev. 476. These articles analyse the now extensive U.S. case law on whether the conditions of solitary confinement infringe the Eighth Amendment prohibition of cruel and unusual punishment. Although that case law is relevant in Canada due to the similar provision in section 2 (h) of the Canadian Bill of Rights I do not propose to discuss this case law since the conditions of confinement at Matsqui do not in any way resemble the sort of conditions which have been struck down by the U.S. case law. See for example the situation described in *Wright v. McCann*, Prison L. Rep. 109 (1972) (U.S. Ct. App. 2d. Cir.)

severe punishment is explicitly recognized in the Division Instruction which directs that "other less severe punishment should be considered before it is imposed" and the period of dissociation should be restricted to as few days as possible.⁹⁰ From my analysis of the Disciplinary Board's records since 1969, as set out in Table 1, it does appear that "the hole" is being used less frequently than in previous years.

Table 1
Sentences of Dissociation⁹⁷

	Sentences	(days involved)	Sentences suspended	(days suspended)	Net days of dissociation imposed	Inmate popu- lation as at 31st Dec.
1969	89	(939)	20	(95)	844	277
1970	97	(1375)	28	(358)	1017	268
1971	45	(755)	17	(225)	530	325
1972	55	(962)	20	(341)	621	335

While it may seem that Matsqui is responding to the Directive's attempt to reduce the use of this severe punishment, during the period when this article was being written the Disciplinary Board started to use dissociation more frequently due to a shift in the standard sentence for drug use from 30 days loss of remission to 10 weekends in dissociation. Given the high number of drug charges it can therefore be anticipated that so long as this shift in sentence continues, the figures for 1973 will show a significantly greater use of the dissociation sentence than the 1971 and 1972 figures.

The other major disciplinary sanction authorized by the Divisional Instructions is the loss of statutory remission. Under the Penitentiary Act every person who is sentenced or committed to a penitentiary for a fixed term shall, upon being received into a penitentiary, be credited with statutory remission amounting to one-quarter of the period for which he is sentenced or

⁹⁰ *Supra*, note 90 para. 10(c) (iii).

⁹⁷ In 1972 sentences of dissociation represented 18% of all sentences (figures for 1969, '70 and '71 are 27%, 28%, and 22% respectively). It appears from these figures that dissociation has been used more sparingly at Matsqui than in U.S. prisons. Thus in a study of U.S. Federal institutions it was found that in 1968 in Leavenworth 32% and in 1969 in Texarkana 42% of all sentences involved dissociation. See Kraft *supra* n. 69 at p. 37. The Harvard Study of 1970 reported a figure of 27% *supra*, note 66 at 215, Table 2.

committed, as time off subject to good conduct.⁹⁸ The Act also provides that an inmate if convicted in disciplinary court of an offence is liable to forfeit his statutory remission. The Divisional Instructions qualify the provisions of the Act by providing that forfeiture of statutory remission shall be imposed only for a flagrant or serious offence.⁹⁹ It should also be noted that under both the Act and the Divisional Instructions the Institutional Head can himself impose no greater sanction than loss of 30 days statutory remission. If he feels that more than 30 days is appropriate he can recommend such a sentence, which is subject to the concurrence of the Regional Director of the Penitentiaries Service, if the recommended sentence is more than 30 but less than 90 days, and to the concurrence of the Solicitor-General if the period exceeds 90 days.¹⁰⁰

The effect of forfeiture of statutory remission is to extend the period during which the inmate remains in the penitentiary by the amount of remission so forfeited. The one qualification to this is contained in both the Penitentiary Act and in the Divisional Instructions in that, under section 23 of the Act, the Commissioner of Penitentiaries or an officer of the Service designated by him may, where he is satisfied that it is in the interest of the rehabilitation of the inmate, remit any forfeiture of statutory remission but shall not remit more than 90 days of forfeited remission without the approval of the Solicitor-General.¹⁰¹ The Divisional Instructions set out certain criteria for the remission of forfeited statutory remission which require that the inmate shall have demonstrated, for a period of twelve months after the punishment was awarded, that he has made a conscientious effort to be of good behaviour, save that where the date of expiration of sentence falls prior to such 12 month period, the application for restoration shall be dealt with on its individual merits. At Matsqui applications for return of forfeited remission are heard by the Inmate Training Board and during the period of our observation we saw only three such applications, all of which were denied. It appeared that inmates who had lost remission usually either could not meet the twelve month trouble free test or were not good rehabilitation prospects for other reasons.

⁹⁸ Penitentiary Act, *supra*, s. 22(1). Prior to the Parole Act in 1969 such "good time" meant that an inmate who had not forfeited any statutory remission and who had earned all available earned remission was released unconditionally at the expiry of approximately 2/3 of his full sentence. Since the amendments to the Parole Act, inmates sentenced or committed to a penitentiary after August 1970 serve their remission periods in the community but under the provisions of Mandatory Supervision. The main effect of this is that if they do not comply with the terms of their supervision it can be revoked or forfeited pursuant to the provisions of the Parole Act and the inmate will then be returned to the institution to serve the remnant of his sentence unexpired at the date he left the institution (i.e. his remission time) with no credit being given for his "street time."

⁹⁹ D.I. 300.01(1)(c)(II).

¹⁰⁰ Penitentiary Act, *supra*, s.22(2).

¹⁰¹ Under Commissioner's Directives the Institutional Head is the designated officer for the purpose of this section for the remission of forfeited remission not exceeding 30 days, the Regional Director is such an officer for an area not exceeding 90 days and any application for remission in excess of 90 days has to be submitted for approval to the Commissioner. Commissioner's Directive 310, dated 10th September 1969.

Unlike the diminished use of dissociation as a punishment over the past few years, the forfeiture of statutory remission at Matsqui is on the increase as appears from Table 2.

Table 2
Sentences of Forfeiture of Statutory Remission¹⁰²

	Sentences	[Days forfeited]	Sentences in excess of 30 days	Inmate Popu- lation at 31st Dec.
1969	44	720	1 of 90 days	277
1970	29	845	2 of 90 days	268
1971	31	930	3 of 90 days	325
1972	62	1890	1 of 60 and 1 of 90 days	335

While the increase in the use of this sentence between 1969 and 1971 (in terms of days forfeited) is not significant and can largely be attributed to population shifts, the increase in 1972 cannot be so attributed. This increase of 100% both in terms of sentences imposed and days forfeited, over 1971 is linked directly, as is so much of what happens at Matsqui, with the institutional practice of penalizing drug use. The great majority of cases involving loss of statutory remission over the past few years have resulted from convictions for drug use and in 1972, whether because of an actual increase in the incidence of drug use or an increased enforcement policy, more of these cases were being dealt with by the Disciplinary Board.

One final feature of sentencing which requires comment is that, drug offenses apart, there is a noticeable lack of concern for uniformity of sentencing by the Disciplinary Board.¹⁰³ This is a matter of considerable importance in light of suggestions that one of the sources of tension in prison among inmates is the discrepancy between sentences imposed on inmates in the criminal courts for what seem to them to be similar crimes.¹⁰⁴ If lack of uniformity in sentencing outside the prison is a cause of tension, it is surely likely to be a greater cause of unrest where it occurs right in the prison for all to see. The approach of the Disciplinary Board at Matsqui is illustrated by the following series of cases.

¹⁰² In 1972 sentences of loss of statutory remission represented 22% of all sentences. While this is higher than the 18% figure reported by the Harvard study (*supra*, n. 66 at 215) it is substantially below the 51% and 44% figures reported in Kraft's study of Leavenworth and Texarkana. See Kraft, *supra*, note 65 at 37.

¹⁰³ Uniformity is used here to mean "that in roughly similar situations the courts [and disciplinary boards] ought to consider similar factors and have similar reasons for selecting particular forms of sentence." Hogarth, *supra*, note 4 at 7.

¹⁰⁴ *The Task Force Report: The Courts*, *supra*, note 20 at 23.

Inmate A was charged with failing to obey an order when he refused to give a urine sample on being requested to do so. He pleaded guilty and his explanation was that he had found a couple of dexedrine pills on the floor and had taken them but was afraid to give the urine sample for fear that the Narcotic Addiction Foundation would make a mistake and send the test back positive for heroin. He had been asked to give a sample on being observed by a guard to be staggering around. Recent needle marks were found on his arm suggesting that he had in fact been "shooting" heroin. The Board imposed a sentence of early lock-up for two weeks and downgraded the inmate to grade 1. Inmate B was also charged with refusing to give a urine sample on request. He pleaded not guilty and his defense was that he did not think that the order was a reasonable one at the time since he could not comply with it due to incapacity. The officer involved testified that the inmate when first asked was unable to produce and so, in accordance with the standard practice, was put in an isolation cell with no toilet until he was able to produce. The inmate then banged on the door and admitted that he had used drugs but could not and would not produce a sample. He was then charged. In response, the inmate testified that he knew he could not produce at that time because he was undergoing withdrawal and did not want to spend the night in the stripped cell and that was why he refused to give a sample. The inmate was found guilty and sentenced to a loss of 30 days statutory remission (i.e. the same sentence he would have received had he given the sample and it had come back positive) and he was downgraded to grade one.

Inmate C was charged with swearing at an officer in that, during the meal line, when told by the duty officer not to help himself to food items, he used offensive language to the officer. The inmate pleaded not guilty and denied that he had sworn, but after some persuasion by the Board, he admitted that he might have used that language and on agreeing to apologize to the officer the matter was dropped. Inmate D was also charged with swearing at a food service officer. The inmate, a big French Canadian had asked for more meat, and on being told "no" by the officer, said something to him in French. According to the inmate, the English translation was something like "you're crazy". According to the food service officer it meant something a little more offensive. The Board accepted that the inmate lost his temper quickly but would cool down equally quickly. He was sentenced to one week early lock-up which included the evening of the annual sports day. In case E (which took place on the same day as case D) the charge was again swearing and being disrespectful to a food officer. The inmate pleaded not guilty. The officer's testimony was that the inmate's job was to wash the cutlery in the kitchen, and on the evening before the incident, he had asked to defer the job until the morning, since he had a bad cold. He did not feel, in light of his condition that, it was appropriate for him to be washing the other inmates' eating utensils. He was sent to the hospital and given some medication and the officer agreed to allow him to postpone the washing up until the morning. The inmate had asked to be roused for the early shift the next morning but was not awakened, and on going down to the kitchen later, the food officer had allegedly denied making the agreement and there were some ill-chosen words exchanged, as a results of which the food officer

placed the inmate on early lock-up that night. The inmate was found guilty and sentenced to 15 days in S.C.U. to be suspended for 6 months pending good behaviour.

Having heard the evidence and observed the demeanor of the inmates in all these cases it is my opinion that by reference to the nature of the offence, there was no basis for different sentences as between the same offence (i.e. as between cases A and B and cases C, D and E) in terms of the gravity of the offence. Could it be however that the Board in handing out different sentences was responding to the "rehabilitative ideal" of making the punishment fit the offender rather than the offence? It was my view that the Board was not basing its sentences in these cases on such an individualised treatment philosophy, since there was no evidence presented to the Board which would have permitted different sentences on this basis, and questioning of the Board members indicated that they were not relying on special knowledge of the inmate but were simply fixing a sentence which they felt "appropriate" without placing any particular value on the concept of treating like cases alike. Without such a concept and with a fluctuating composition of the Board (particularly its advisers) it is inevitable that uniformity of sentencing will not be a feature of the Board's sentencing behaviour.¹⁰⁵

An issue related to sentencing which arises from my observations of Warden's Court is that of double jeopardy, a notion which has deep roots in the criminal law and quite simply requires that a man not be exposed to risk of punishment for the same offense more than once. The possibility of such double jeopardy arises where an inmate does something which not only constitutes an offense under the prison disciplinary code but also constitutes an offense under the Criminal Code. Divisional Instructions seek to guard against such jeopardy, by setting out certain guidelines for Institutional Heads in deciding whether the matter should be dealt with as a criminal offense in outside court or as an internal disciplinary matter. The Instruction provides that the Institutional Head shall decide whether the offense is of a minor or serious nature, and in case of doubt shall consult with a local Crown attorney and be guided by that officer's advice; that minor offenses shall not be referred to the local law enforcement authority but shall be investigated and dealt with as a prison disciplinary matter by the Disciplinary Board; that all serious offenses shall be reported to the local law enforcement authority and that officers of that body shall be given every reasonable opportunity to conduct investigations. Escapes are dealt with separately and it is provided, *inter alia*, that where an inmate escapes from a minimum or a medium security institution and no other offense is alleged to have been committed by him, the Institutional Head, after considering all the circumstances, shall determine whether the offender shall be dealt with by the Disciplinary Board

¹⁰⁵ In looking over the Disciplinary Board records for the period 1968-71 I came across a number of cases where there seemed to be glaring disparity but, not being present at the hearing and not knowing the background, it is of course impossible to say whether or not there were factors which came out during the hearing which justified the apparent disparity.

or whether the case should be referred to the local Crown Attorney.¹⁰⁶ If the inmate is to be tried by a court of law for a criminal offense the Instruction specifically provides that no disciplinary action shall be taken by the Institutional Head, although the inmate may be dissociated pending disposition of the case if it is considered by the Institutional Head to be necessary in the circumstances. Where the case has been referred to the local law enforcement authority and after investigation it reports that satisfactory evidence cannot be obtained to justify proceedings in the courts, the Institutional Head is free to proceed with the matter as an internal disciplinary problem. If the local authority wishes to keep the case open the Head is directed not to take internal disciplinary proceedings until the authority indicates that its file on the matter is closed.

Although the Divisional Instructions seek to avoid double jeopardy, my observations of the Disciplinary Board at Matsqui indicate that institutional disciplinary action is taken in relation to matters which are the subject of proceedings in outside court. In several cases involving inmates who had been charged, and in some cases convicted, of escape or being unlawfully at large, proceedings were instituted in Warden's Court not directly on the charge of escape but on matters arising out of the escape. Thus, it was the practice at Matsqui to charge a returned escapee with damaging government property where he returns without his government issue clothes (which for obvious reasons will be the case except where the inmate was captured shortly after escaping). On a number of other occasions inmates who had been charged in outside court with being unlawfully at large after failing to return from a temporary absence pass, were also charged with using drugs while on the temporary absence pass on the basis of a urine test taken on their return to the institution. A third example of this form of double jeopardy arose in a case where an inmate was discovered in possession of narcotics and was charged in outside court with such possession and was charged in Warden's Court with possession of contraband in the form of money received for the drugs. While in all these cases an argument can be made that the charge before the Disciplinary Board concentrated on a different aspect of the inmate's behaviour than the charge in outside court, it is transparently clear that the disciplinary charge dealt with the same event, merely isolating the particular aspect of it which was felt to be institutionally relevant. This does not avoid the fact that isolating this particular feature imposes a double punishment on the inmate for his behaviour.

¹⁰⁶ The Penitentiary Act itself authorises a form of double jeopardy in relation to escapes since it is specifically provided that where an inmate is convicted in a criminal court of escape he automatically forfeits $\frac{3}{4}$ of his statutory remission (s. 22(4)). While it would be expected that judges in sentencing inmates for escape would be aware of this provision, and take it into account in their sentences, unfortunately this is not always the case and the result is that the inmate receives a sentence that does not recognize that there is an automatic punishment flowing from the Penitentiary Act. It was very surprising to the writer to find out that some inmates were not aware of this provision, which can have a greater impact on the amount of time they will have to serve than an escape sentence, bearing in mind that the maximum sentence the court can impose for escape under the Criminal Code is two years.

Administrative and Judicial Review of the Disciplinary Board

If an inmate feels aggrieved either by the conviction or sentence of the Disciplinary Board, can he, like a person convicted of crime, appeal to a higher authority? During the period of this study there were no provisions contained in the Penitentiary Regulations or in the Commissioner's Directives dealing with appeal from a decision of the Disciplinary Board and the only recourse an inmate had within the Penitentiary Service was to request a review by the Director of the Institution or write a letter to the Regional Director or to the Commissioner hoping it would prompt some review at the higher level.¹⁰⁷ This is an avenue always open to an inmate in regard to any aspect of his treatment in prison where he is dissatisfied and is not limited to disciplinary hearings.¹⁰⁸

Apart from an "appeal" process within the penitentiary system itself, it would be expected that the Disciplinary Board, as an administrative body making important decisions about the inmate's life, would under normal principles of administrative law be subject to some degree of judicial review by the regular courts. Canadian courts, however, like their English and American counterparts, have traditionally been very reluctant to interfere with the internal management of the prison. While many American courts have recently abandoned such a "hands off" policy, with its automatic deference to the expertise of prison administrators in a number of important areas, the Canadian courts have so far been reluctant to follow suit.¹⁰⁹ There have however been some Canadian decisions which do provide a measure of judicial review, the most important of which is the Ontario Court of Appeal decision in *R. v. Beaver Creek Correctional Camp ex parte McCaud*.¹¹⁰

In the *Beaver Creek* case an inmate of a minimum security penitentiary

¹⁰⁷ I did not come across any cases where resort to this review modified the Board's decision. The Harvard study also found that administrative review by the Director was "fundamentally inadequate", *supra*, note 66 at 221.

¹⁰⁸ In August 1973 this avenue for review was formalized in a new Directive headed "Inmate Grievance Procedures". The Directive provides for three levels of review starting at the Director of the Institution (level I) and moving through to the Regional Director (level II) and Commissioner of Penitentiaries (level III). It is not clear however that these procedures are applicable to decisions of the Disciplinary Board and the preliminary evidence at Matsqui (there have been no grievances lodged with the Director in the first five months of operation of the new procedures) suggests that such internal procedures are less than adequate. While a Correctional Investigator has been appointed as an independent person outside the Penitentiary Service (see P.C. 1973-1431 5th June 1973) the Directive requires that inmates use the penitentiary grievance procedures before presenting a grievance to the Investigator.

¹⁰⁹ See, *supra*, note 65. See also S. Goldfarb and R. G. Singer, *Redressing Prisoners Grievances* (1970) 39 Geo. Wash. L. Rev. 175, R. G. Singer, *Prisoners Legal Rights: A Bibliography of Cases and Articles* (Boston: Warren, Gorham & Lamont, 1971). The case law and literature in the U.S. is in fact so extensive that there are two periodicals dealing with this area exclusively (see Prison Law Reporter and Prisoners Rights Newsletter) and at the time of writing three full length articles have been published dealing with the goals, strategies and practice in Prisoners Rights Litigation. See e.g. Hirschkop, Grisman and Milleman, *Litigation an Affirmative Prisoner Rights Action* (1972) 11, Am. Cr. L. Rev. 39.

¹¹⁰ (1969), 2 D.L.R. (3d) 545.

had applied by way of *certiorari* with respect to disciplinary action taken by the Superintendent of the institution. The sole issue before the court was whether an institutional head acting in his disciplinary capacity was amenable to *certiorari* if he acted without jurisdiction. The applicant alleged that he was denied a hearing, denied the right to give evidence, was not told the charges against him and that the punishment imposed was not authorized by law. Although there was not before the court sufficient particulars of the acts of the Institutional Head which were objected to, the Ontario Court of Appeal felt it desirable to consider generally "the implications of an institutional head acting with respect to discipline and imposing sanctions for infractions of discipline".¹¹¹ The court held that, by virtue of the power he exercises, an Institutional Head has a duty to act judicially, *certiorari* will lie to review the exercise of that power where (1) the action sought to be reviewed was in excess of any jurisdiction lawfully exercisable by him, (2) there was a complete absence of any jurisdiction or (3) there was a failure to observe the rules of fundamental justice unless there were some special statutory provisions permitting such non-observance.¹¹²

The court in distinguishing between decisions which were purely administrative in character and those which were required to be exercised judicially stated that the proper test to apply was

whether the proceedings sought to be reviewed have deprived the inmate wholly or in part of his civil rights in that they affect his status as a person as distinguished from his status as an inmate.¹¹³

The court then went on to enumerate what are the civil rights to which an inmate remains entitled which may be affected by the acts of the Institutional Head. The court stated that since the inmate's rights to liberty was, during the period of his lawful confinement, non-existent, all decisions of the officers of the penitentiary service with respect to the place and manner of confinement were the exercise of an authority which was purely administrative. Also the withdrawal of or restrictive interference with privileges, the normal punishment for minor disciplinary offenses, and the crediting or abstaining from crediting of earned remission were not regarded by the Court as acts affecting any civil right of the inmate as a person and hence were purely administrative and non-reviewable. On the other hand, the court held that forfeiture of statutory remission, since it extended the length of imprisonment, affected an inmates right to liberty and hence the decision to forfeit must be exercised judicially. The court also held that the ordering of corporal punishment was punishment which affected the civil rights of an inmate to personal security and was therefore the exercise of a power by its nature judicial.

Thus, under the court's classification of judicial and administrative decisions, those decisions affecting "liberty" and "personal security" are judicial while those affecting "place and manner" (at another point the court talks of the "locale or nature") of confinement are purely administrative. The

¹¹¹ *Id.* at 547.

¹¹² *Id.* at 554.

¹¹³ *Id.* at 550.

court appears to view "liberty" as an all or nothing proposition; one is either free by being out of prison or "unfree" by being in prison. The reality however is that "gradations of institutional freedom exist after the denial, by incarceration, of liberty in its traditional sense."¹¹⁴ Because of its limited view of "liberty" there are some very real difficulties with the court's classification. Under its scheme the court would classify the decision of the Disciplinary Board to impose punitive dissociation as administrative, on the basis that it merely affects the place of confinement, since instead of being in the general population, the inmate is in the Special Correctional Unit of the institution. What the court fails to consider however is that such a change of locale drastically affects the qualitative nature of an inmate's confinement. While it is true that with imprisonment he loses the liberty to walk the street a free man, he still retains a certain freedom of mobility and communication while in the general population and this institutional freedom is severely curtailed by being placed in dissociation.

The court's classification of dissociation as administrative is also suspect on another basis. While the court is quite prepared to consider a decision involving corporal punishment as being judicial because of its impact on the personal security of an inmate, it disregards the fact that the punishment of dissociation also has a major impact on an inmate's right to personal security. The only difference between the two is that in the one case the impact is a purely physical one while in the other it is psychological. The literature on the effects of dissociation leaves no room for doubt on this point.¹¹⁵ While the distinction drawn by the court might make some sense if the law generally drew such a distinction, it is now clear that an action lies in tort for the intentional infliction of psychological shock in the same way as for physical invasion of a person and that negligence as a cause of action will lie in respect of psychological injuries as well as for physical injury.¹¹⁶ What is particularly unfortunate about the court's distinction is that it classifies as judicial and permits review of decisions involving a punishment which has never been used at Matsqui and as a result of recent amendments to the Penitentiary Regulations is no longer legally authorised,¹¹⁷ while relegating to an administrative non-reviewable status decisions involving a serious punishment which is still very much a part of the prison life.

There is also some difficulty in the distinction the court draws between a decision affecting statutory remission, regarded as judicial, and one affecting earned remission, regarded as administrative. As we have seen, statutory remission is credited to an inmate at the beginning of his sentence. Earned remission on the other hand, may be earned at the rate of 3 days for each month the inmate applies himself industriously¹¹⁸ and the decision to credit

¹¹⁴ Milleman, *supra*, note 65 at 38.

¹¹⁵ *Supra*, note 95.

¹¹⁶ See John G. Fleming, *The Law of Torts* (4th ed. Sydney: Sydney Law Book Co. 1971) at 32-5, 148-153.

¹¹⁷ See S.O.R./72-398 s. 7(2) 27th Sept. 1972 amending P.S.R., S.O.R./62-90, s. 2.28(4).

¹¹⁸ Penitentiary Act, *supra*, s. 24(1).

such remission is made monthly. It would seem therefore that the court is distinguishing between a decision to take away something already legislatively credited (statutory remission) which has the effect of extending the length of imprisonment, and a decision to abstain from crediting something (earned remission) which operates to leave the length of imprisonment the same.¹¹⁹ While this may make sense in terms of the provisions of the Penitentiary Act, such a distinction has no vitality in terms of the reality of prison. The administrative practice of the Penitentiary Service is to give everyone earned remission automatically except in special instances. In other words, the practice is to set up administratively an expectation in the inmate that he will earn remission, unless he does something wrong, in much the same way as the legislatively created expectation that he will receive all his statutory remission if he does not commit a serious offence. This is reflected in the recording procedure of the Penitentiary Service where an inmate's expiry of sentence date, as communicated to the inmate, is calculated on the assumption not only that he will not forfeit his credited statutory remission, but that he will earn all possible earned remission. From the inmate's perspective therefore the non-crediting of earned remission is functionally identical to the forfeiture of statutory remission in extending his release date.¹²⁰

¹¹⁹ Another commentator on the *Beaver Creek* case has suggested that the Court may have intended to draw a distinction between the two types of remission on the basis that an inmate is entitled as of right to statutory remission but earned remission is a privilege, thereby endorsing the right-privilege distinction as the touchstone of whether officials should be required to act judicially. See K. Jobson, *Fair Procedure in Parole* (1972) 22, U. of T. L. J. 267 at 286-7. This distinction, as Jobson points out, is losing ground in England (see *Ridge v. Baldwin*, [1964] A.C.40) and has been rejected in the U.S. Thus in *Sostre v. McGinnis* 442 F. 2d 178 (1971) at 196, the Second Circuit Federal Court of Appeals in a case involving prison disciplinary decisions stated that a state "may not avoid the rigours of due process by labelling an action which has serious and onerous consequences as a withdrawal of a 'privilege' rather than a 'right' The distinction between a 'right' and a 'privilege' or between 'liberty' and a 'privilege' for that matter — is nowhere more meaningless than behind prison walls."

¹²⁰ The functional equivalence of the loss of statutory remission and failure to credit earned remission appears in another way at Matsqui due to the fact that the most common reason for failure to credit earned remission, as with the loss of statutory remission, is the conviction of a disciplinary offence. Commissioner's Directives provide that an inmate works industriously (the criteria for earned remission under the Penitentiary Act) when he makes "an effort to participate cooperatively in the approved program of inmate training and by his attitude demonstrates an interest in his ultimate rehabilitation in society" (C.D. 311, para. 1(b) dated 1 Nov. 1963). An inmate is deemed to have failed to work industriously if, *inter alia*, he was not available for work for five consecutive days by reason of a disciplinary offence or he was convicted of a serious disciplinary offence resulting in the loss of statutory remission (para. 6). However, the practice at Matsqui was for the Earned Remission Board to automatically deny earned remission to any inmate who was convicted of any disciplinary offence during the month in question, whether or not the punishment involved him in the loss of five days work (e.g. a sentence of five days in dissociation) or the loss of statutory remission. Leaving aside the dubious merits of this practice in light of the Directive, it clearly shows that the failure-to-earn decision in these cases is essentially linked to the decision of the Disciplinary Board as an additional sentence of three days extra imprisonment and is the same thing as a sentence actually imposed by the Disciplinary Board of the loss of three days statutory remission.

Returning to the court's enumeration of decisions affecting an inmate's civil rights the *Beaver Creek* court went on to find that an inmate became entitled to certain statutory rights which are contained in the Penitentiary Act and in Regulations made thereunder. The court considered however that the Commissioner's Directives did not confer any rights on the inmates, being in the realm of administrative policy. As the court put it "there is no obligation owed by a staff member to the inmate to adhere to the Directives".¹²¹ The court went on to hold that such non-observance of the Directives would not result in a lack of jurisdiction or constitute an excess of jurisdiction for purposes of review by the courts. On the other hand non-observance of provisions in the Act or Regulations, which does create rights in the inmates, would have such a debilitating effect on the Institutional Head's jurisdiction and hence would be reviewable.

Where an Institutional Head is required to act judicially he must observe the principles of fundamental justice which the court held to mean that

(1) the inmate affected must be fully informed of the disciplinary offence he is alleged to have committed, (2) be given a fair opportunity to present his case and the evidence relevant to the matters he is called upon to face and (3) that the decision of the Institutional Head be arrived at judicially upon material properly before him and not capriciously or in reliance upon some consideration not relevant to the charge.¹²²

In *Beaver Creek*, the inmate's counsel had argued that the Institutional Head's action infringed section 2(e) of the Canadian Bill of Rights which guarantees the rights of a person to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. In relation to this argument the court held that, on its interpretation of the Penitentiary Act, where the civil rights of an inmate may be affected by the decision of an Institutional Head there must be a fair hearing in accordance with the principles of fundamental justice, or thus there was no conflict with the Bill of Rights.

It should be observed that the distinction the court draws, between decisions contravening provisions of the Penitentiary Act and Regulations, which constitute a repository of inmate statutory rights and are reviewable, and those contravening provisions of the Commissioner's Directives or Divisional Instructions, which are mere administrative policy and are not reviewable, in effect places very severe restrictions on the scope of judicial review. As one commentator has put it:

As the Act and the Regulations are worded in the most general fashion specifically making reference to the Directives for 'working' details there is little danger that an inmate's statutory civil rights will ever be violated according to such a standard.¹²³

At first blush, it would appear from the *Beaver Creek* ruling on the non-legal status of the Commissioner's Directives that inmates would have

¹²¹ *Supra*, note 110 at 553.

¹²² *Id.*

¹²³ G. E. Kaiser, *The Inmate as Citizen: Imprisonment and the Loss of Civil Rights in Canada* (1971), 2 *Queen's Law Journal* 209 at 246.

no access to the courts in cases where, though the decision was one in its nature judicial, for example, resulting in the forfeiture of statutory remission, the Institutional Head had failed to observe the provisions of Divisional Instruction 300.1, which deals with the procedure of the Disciplinary Board. In particular, it will be recalled that during the period of this study no written notice, and indeed in many cases no notice of the charge, was given to the inmate even though the Divisional Instruction provides quite clearly that no finding shall be made against an inmate charged under s. 2.29 of the Penitentiary Service Regulations unless he has received written notice of the charge against him and a summary of the evidence against him. While it is true that review of such a decision could not be obtained for failure to observe this Divisional Instruction because there would, under *Beaver Creek*, be no lack of jurisdiction through mere failure to observe Divisional Instruction, it can be argued that such lack of notice constitutes a failure to observe one of the rules of fundamental justice, which is a basis for review of a decision which has to be exercised judicially. Similarly, an argument can be made that the practice of conducting part of the hearing without the presence of the inmate, not only is in violation of the Directives, which require that the inmate be given an opportunity to make a full answer and defense to the charge, but also violates a rule of fundamental justice in that the inmate is denied a fair opportunity to present his case and evidence relevant to the matter he is called upon to face.

There is a further limitation on the utility of judicial review under *Beaver Creek* deriving from the lack of any requirement in the Regulations or Directives of a full written record of disciplinary proceedings. The present requirement calls for only a brief statement of the charge, the plea, the verdict of the Board and the sentence. There is no provision for a summary of the evidence or the reasons for the decision. While previous Divisional Instructions required verbatim evidence to be taken where statutory remission might be forfeited, there is no such requirement in force at the present time.¹²⁴ Without a full written record an application for review based on grounds related to what transpired at the hearing becomes a virtual impossibility. Unfortunately, simply requiring such a record would not necessarily solve the matter. Thus at Matsqui, in the limited number of cases where, following the previous Instructions, a taped transcript was prepared, it was the practice of the Board to exclude from the record comments made during that part of the hearing in which the inmate was sent out of the room. Such a practice limits, to the point of exclusion, the possibility of review on the basis that the Board considered material not relevant to the charge.

The combination of these factors and the classification of prison decisions adopted by the *Beaver Creek* court leaves a very narrow scope for judicial review. In practical terms the decision means that only where forfeiture of statutory remission is involved can an inmate seek such review and even then not, save in limited circumstances on the basis of what is likely to be the most common cause for complaint — a disregard of Divisional In-

¹²⁴ However, at Matsqui the practice was to follow the previous Divisional Instructions.

structions. The decision, while seeking to bring the prison disciplinary proceeding into the mainstream of administrative law, does so by an analysis which bears no relationship to the realities of prison and the impact institutional decisions have on inmates' lives. It purports to bring "law" into the prison and yet leaves it, unknowingly, lawless.

Since *Beaver Creek*, the Federal Court Act¹²⁵ has been enacted which transfers to the new Federal Court jurisdiction to issue prerogative writs against, and review the decisions of, a "federal board, commission, or other tribunal". In *Re Greene and Faguy et al*¹²⁶ Lerner J. expressed the view that a federal prison Disciplinary Board was within the ambit of the Act¹²⁷ and that the Act barred any proceedings other than in the Federal Court. While Lerner, J. in this case considered only the wording of section 18 of the Act, which gives to the Trial Division of the Court exclusive original jurisdiction to, *inter alia*, issue an injunction, a writ of certiorari, mandamus or to grant declaratory relief against a federal board and to hear an application for relief in the nature of such relief, of much greater significance in terms of judicial review of prison disciplinary decisions is section 28 of the Act.

This provides:

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

While under this section, as under the remedy of *certiorari* as explained in *Beaver Creek*, it is still necessary to show that the decision sought to be reviewed is required to be exercised judicially, the grounds for review, particularly that based on subsections (b) and (c), go beyond the grounds established in *Beaver Creek*. Section 28 could then be the procedural vehicle

¹²⁵ S.C. 1970, c.1.

¹²⁶ [1972] 3 O.R. 395.

¹²⁷ The Act defines federal board, commission or other tribunal as

2(g) any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law as provided under s. 96 of the B.N.A. Act 1867.

for a more expansive approach to administrative law in the prison.¹²⁸ Such a development however is dependent not only on there being a requirement for a full record of the proceedings before the Disciplinary Board but upon the Federal Court adopting a different analysis from *Beaver Creek* of what decisions must be exercised judicially. That analysis, based on the strange and dehumanizing distinction between decisions affecting an inmate's status as a person as opposed to his status as an inmate, does not reflect the physical and psychological reality of prison. The Federal Court under its new jurisdiction must develop a prison administrative law which does reflect that reality. To do so the court must recognise and grapple with the important concept of "institutional freedom" and be prepared to classify as judicial not only decision which affect traditional liberty but also those which substantially impair the inmate's institutional freedom.¹²⁹

Part III The Reform of Prison Justice — The Due Process Model

While the development of a realistic prison administrative law is important to ensure visibility of prison decisions, there will always remain very real limitations on the effectiveness of the court as an institutional mechanism for assuring fairness in the prison, based largely on the necessarily intermittent nature of judicial review. How else then can fairness be brought to the prison? The strategy of choice for ensuring fairness in the larger criminal justice system, to control discretion, to ensure reliability of fact finding and rationality in conclusions, has been the adoption of procedural due process. The combined effect of the Commissioner's Directives, Divisional Instructions and Standing Orders is to provide a procedural framework of due process with written notice of the charge, the right to call evidence and cross-examine witnesses, a written record and inmate representation. This study, however, suggests that prison administrators and staff have perceptions of the nature of disciplinary proceedings that place a low priority on the value of due process and the procedural protections which give it meaning,

¹²⁸ On the extent to which s. 28(1) does extend the previous bases for judicial review see D. Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform* (1973) 23 U. of T. L. J. 15, especially at 36-40. However an application for review under section 28 does have some drawbacks as against an application for a writ of *certiorari*. Under s. 28(2) the application must be filed within 10 days of the decision being made known to the party affected. The usual period of limitation for a writ of *certiorari* in Supreme Court is 6 months. Section 28(2) empowers the Federal Court of Appeal to receive applications out of time and it is hoped that the Court will take a sensible approach to this having regard to the difficulties inmates have in contacting lawyers and starting litigation.

¹²⁹ The Court could also give consideration to adopting generally as the test of judicial vs. administrative the one developed in the U.S. in the context of when due process of law must be afforded, which asks whether the decision involves the imposition of "grievous loss". This test has been applied by the U.S. Supreme Court in a variety of situations which traditionally have been held to be non-reviewable by the courts. See for example: *Goldberg v. Kelly* 397 U.S. 354 (1970) (deprivation of welfare benefits) *Escalera v. The New York Housing Authority* 425 F. 2d 853 (2nd Cir. 1970) (withdrawal of the privilege of residing in a public housing project). *Morrissey v. Brewer* 408 U.S. 471 (1972), 92 S.Ct.2593 (revocation of parole). The "grievous loss" test has been extended into the area of prison administrative law by a number of lower court decisions, see cases cited *supra*, note 65.

and that the mere provision of such protections without ensuring their implementation by officials imbued with a sense of their value is likely to result in their being circumvented. Thus at Matsqui written notice of the charge and a summary of the evidence simply were never given and the right to cross-examine was substantially impaired by having the inmate withdraw from the room before the rendering of a verdict or sentence while comments were exchanged about him. This undermining of due process is not just based on prison administrators viewing due process as a negative value in the context of the prison; it is functionally related to the way the disciplinary proceeding itself is viewed. The procedural protections embodied in the due process model are designed to ensure the integrity and fairness of the fact-finding and not the dispositional process. The Disciplinary Board, as presently constituted, views the disciplinary process as dispositional in nature and therefore confuses the issues of guilt and disposition in relying upon the often extensive knowledge its members have about the inmate they are trying; so long as it continues to do so, whether on the rationale of treatment, staff morale maintenance or efficiency, the desired impact of due process will not be achieved.

The crux of any real reform lies therefore in an impartial disciplinary tribunal, in the sense of one which will approach cases free from bias based on prior knowledge of the inmate, and which will handle the task of discipline in a spirit of maximizing rather than undermining the procedural protections designed to ensure a fair hearing. Recent decisions in the U.S. federal courts which have addressed the issue of what "process" is "due" under the 14th Amendment of the U.S. constitution in the context of prison disciplinary proceedings, have held that the requirement of an impartial tribunal is met where any senior correctional officer¹³⁰ or any member of staff who has any prior involvement with the incident under examination¹³¹ is precluded from participation. While such exclusions do avoid the clearest cases of bias, on the basis of my observations, it cannot be assumed that other members of the prison staff, be they counsellors, teachers or prison administrators, are free from bias merely because they have no involvement with the particular incident. The Canadian prison, unlike many of its American counterparts tends to have a relatively small population (compare the 2,000 inmates of Attica Prison in New York and the 3,000 of San Quentin, California with the 600 inmates of the B.C. Penitentiary and the 300 of Matsqui) so that most senior staff are exposed to an informal exchange of information about inmates, particularly those who are seen as trouble makers. Quite apart from this, the U.S. standards do not meet the point made regarding the low value placed on due process by such officials.

It is suggested that the proper response to the need for an impartial tribunal, in the sense I have defined it, is to have a truly independent chairman of the Disciplinary Board, that is someone who has no particular ties or allegiance to the administration of the prison or to the federal penitentiary

¹³⁰ *Bundy v. Cannon* 328 F. Supp. 165 (1971) at 172.

¹³¹ *Landman v. Royster* 333 F. Supp. 621 (1971) at 653.

service. Not only would such an independent chairman avoid the bias of personal knowledge of the parties involved but also the bias of institutional pressures. He would not be threatened, as is the prison administration, by the prospect of disrupting staff morale and his examination of the facts would not be encumbered by an automatic presumption against the inmate's credibility.¹³²

This suggestion of a completely independent chairman to adjudicate disciplinary matters is not unprecedented. In the English correctional system there is legislative provision for the appointment at every prison of a Board of Visitors, of whom not less than two shall be Justices of the Peace. The punishments which a Governor of a prison may impose for a disciplinary offence are limited but where an inmate is charged with a more serious offence for which the penalties the Governor may impose seem inadequate, he may refer the charge to the Board, who may award penalties of a more severe nature.¹³³

The requirement that some of the Board of Visitors be magistrates has special merit. One of the arguments made in this article is that the prison disciplinary system, while having special features, should be viewed as part of the total criminal justice system. Involving judges who hear cases in the larger system in prison disciplinary proceedings would reflect this continuity. An advantage of recognizing this continuity in this way would be that a judge hearing cases under the prison disciplinary system would be required to become alert to the realities of the prison and this should have important effects on him in his sentencing policy in the larger system.¹³⁴

The English experience, however, indicates that there are some limitations in its approach. Oral accounts (there have been no proper evaluations of the Board of Visitors model) suggest that the visiting magistrates are not perceived by inmates as being impartial but rather as allies of the prison officials. This is largely predicated on those magistrates being closely involved with the administration of the summary criminal courts in England (popularly known as the "police courts"). The preference such magistrates are thought to show for official police evidence in their every day judicial activities is, or so inmates can reason, likely to carry over into a preference for the evidence of the prison staff. It would be naive in the extreme to deny a similar preference as the operative norm in many provincial courts in Canada and while some of this criticism could be tempered by a careful selection of

¹³² Harvard Study, *supra*, note 66 at 222. The study also felt that an outsider's investigation might meet with greater success because inmates with relevant information might be less fearful of retaliatory action than they would be when revealing possibly self-incriminatory evidence to administrative staff.

¹³³ Prison Rules, Statutory Instruments 1964 No. 388 Vol. 51.

¹³⁴ At Matsqui some inmates complained of a local judge who handed out particularly severe sentences for inmates who failed to return on temporary absence passes and were charged with being unlawfully at large. Such sentencing was in my view attributable to the fact that the judge did not have a clear appreciation of the special circumstances which led to some inmates' failure to return and which differentiated these cases from an ordinary escape.

judges who had reputations among the inmate society as fair-minded, there are alternative ways to avoid this possible cloud on impartiality. One way would be to appoint as independent chairman of the Disciplinary Board senior counsel who had extensive experience as defence counsel but also had regular appointments as Crown counsel. Such counsel would likely be acceptable to both prison officials and inmates and in seeking the necessary understanding of the realities of the prison would bring a healthy skepticism to both official and inmate claims. A third possibility would be to utilize the special judiciary which the Federal Law Reform Commission is considering to deal with sentencing. The essential feature of this judiciary would be a specialized knowledge in the area of criminal law and corrections and such judges could bring both a lawyerly scrutiny to the issue of guilt and an understanding to the issue of disposition which would recognise the concerns of prison officials.

The assumed sensitivity of a legally trained chairman to due process values is particularly important. As we have seen, judicial review is very restrictive in Canada and even were the climate of review to change under the impetus of the Federal Court Act, the implementation of due process standards on a day to day basis clearly can be more effectively done by an independent chairman who makes rather than reviews disciplinary decisions. In addition, since such a chairman, although an outsider, will have to become sensitive to the particular reality of the prison, his role is much more likely to become accepted by the prison staff than the necessarily intermittent and detached role of the Federal Court of Appeal.¹³⁵ Such acceptance is vital since part of the work of the Disciplinary Board, like that of the outside court, is an educative one, and the independent chairman will necessarily be involved in legitimating due process values in the eyes of all participants in the process.

Would the introduction of an independent chairman of the Disciplinary Board unduly reduce the flexibility of the present Board as part of the total institutional fabric of inmate training? At the present time the chairman of the Disciplinary Board because of the full flow of information in disciplinary proceedings and the input provided by custodial and counselling staff can feel that he is taking an integrated view of the matter. This integration is further reflected in the fact that decisions about downgrading, loss of temporary absence privileges and change of work assignments, while often made at disciplinary proceedings, are also made independently of disciplinary proceedings by the Inmate Training Board and the Grading Board and members of the Disciplinary Board are involved in these other decision processes. Might it not be argued that an independent chairman who would not participate in these other facets of the prison would take a fragmented approach to discipline?

¹³⁵ The Harvard study documented the hostility many staff felt towards the Federal Court's intervention in prison operations and in particular how the Court was viewed as an advocate for the inmates rather than as an independent arbiter, *supra*, note 66 at 226.

It is suggested that the presence of an independent chairman of the Board would in no way preclude the input of prison expertise, be it from custodial or counselling staff. With an independent chairman, particularly if he were legally trained and if the other recommendations in this article are implemented, this input would take place at the disposition stage of the proceedings rather than at the adjudication of guilt or innocence. The very purpose of the independent chairman is to observe this kind of distinction and to prevent the bias that inevitably creeps into decisions where such a distinction is not drawn or cannot be drawn because of the function of the persons adjudicating the matter. As to the independent chairman's role in matters such as change of work assignment and loss of temporary absence privileges arising out of disciplinary proceedings, at Matsqui, it was a matter of chance whether or not an inmate was awarded one of these penalties at the disciplinary hearing or at a meeting of the Inmate Training Board on some other occasion. This would suggest that referring all matters of change of work assignment and restrictions on temporary absence passes to the Inmate Training Board would not cause any real dislocation. However it can be argued that dealing with all these matters at one decision point, particularly where the change or restriction flows from the incident under review in the disciplinary hearing, is advantageous not only from the administrative point of view but also from the inmate's point of view since at least he knows where he stands and what the full consequences of the offense are. This could be effected if one of the advisors to the independent chairman were the Superintendent or Supervisor of Classification, both of whom are also members of the Inmate Training Board, who could make recommendations as to change of work or loss of temporary absence privileges in light of the policies developed at this Board. In any event, it is likely that the independent chairman after a short period of time would become familiar with these policies so that decisions by him on these matters would fit in with policies developed by the administration on a more general basis outside the disciplinary context.

Nor would the existence of an independent chairman for the hearing of disciplinary proceedings interfere with the discretion the prison administration has at the charging stage. At present the decisions whether to file an offence report, whether to deal with an offence through Disciplinary Court or in a more informal way, and whether to refer the matter to outside court, are all matters made by prison administrators, bearing in mind the total flow of information available on the inmate and the incident. This would continue and thus, at both the pre-trial decision stages and the sentencing stage, the presence of an independent chairman would not impede the full flow of institutionally relevant information.

There is also a need for adequate representation of the inmate before the tribunal. The Directives make no provision for representation although, at Matsqui, Standing Orders require that the inmate be represented by his counsellor. This representation in most cases bore no relationship to traditional notions of representation. Counsellors who had a treatment view of disciplinary proceedings regarded themselves as members of the treatment team and saw their role as introducing whatever they knew about the inmate,

whether to his advantage or his prejudice. Even counsellors who tried to adopt a classical pose as advocate for the inmate clearly were in some dilemma, since the underlying reality of the prison is that their main allegiance is to the institution and to the correctional system. Making a demand on them to participate in an adversary proceeding against the institution on the side of the inmate gives rise to a conflict of roles. It is not surprising therefore that most of them reinterpreted their role as representative and participated in the proceedings as members of the disciplinary team. To expect anything else is probably very unrealistic.¹³⁶

A leading American decision would permit an inmate the right to retain counsel where a loss of "substantial rights" is involved.¹³⁷ Other U.S. decisions have suggested that where the disciplinary proceeding involves an offense which would be prosecuted in outside court afterwards, retained or appointed counsel is necessary to protect the inmate's right against self-incrimination.¹³⁸ In the context of the Canadian penitentiary system, the Commissioner's directives seek to avoid the possibility of a case being dealt with in both disciplinary court and outside court, so that the need for counsel to protect the more limited right against self-incrimination existing in Canadian law is not necessary.¹³⁹ Assuming that the right to counsel was limited to serious cases — those where statutory remission may be forfeited or where punitive dissociation may be imposed — would counsel have a meaningful role to play in prison disciplinary proceedings? It is not likely that he would have any opportunity to arrange a suitable plea bargain, and it is difficult to justify the need for a lawyer just at the disposition stage of the proceeding in the event of a guilty plea. This leaves the core function of the criminal law, that of conducting the defense after a not guilty plea. Based on my observations at Matsqui, in a significant number of serious cases where a not guilty plea was entered, a lawyer's participation would, in my view, have resulted in a trial more consonant with a fair hearing than what actually occurred. Some cases showed the need for lawyer's skills where there was either some ambiguity as to the offence charged or complicated factual questions to determine. Cases also arose where a lawyer's participation would have resulted in the injection of concepts originally developed in the context of criminal law but which had equal relevance to the charge in Warden's Court.

In one of the first cases I observed the inmate was charged with assaulting a prison guard and his defense was that he had taken LSD and recalled only that he felt he was suffocating and had to get out of the prison. The

¹³⁶ The Harvard study also noted the limited representation provided by counsellors. "There is a basic conflict — we are caught between the inmate and the rest of the staff. If we win a case for him, the staff resents it; if we lose, he resents us". *Supra*, note 66 at 208.

¹³⁷ *Supra*, note 131, at 654.

¹³⁸ See *Clutchette v. Procunier* 328 F. Supp. 767 at 778. See also W. B. Turner and A. Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime* (1972), 21 Buffalo L. Rev. 654.

¹³⁹ See *supra*, note 43.

evidence in fact was that he had stripped off his clothes and had run around the prison completely out of control. He had no recollection of striking the officer. The case was in fact remanded pending the inmate's hospitalization and was eventually dismissed. If it had been tried, however, the criminal law relating to the extent to which drugs, like drink, can negative the requisite *mens rea* should clearly have been relevant. Under existing case law an inmate who was so affected by drugs that he was not aware that the person he was assaulting was a prison guard could not be convicted of assaulting a prison guard although he could be convicted of common assault.¹⁴⁰ It is difficult to see why this should have any less relevance in a prison context.¹⁴¹ Similarly cases commonly occur of fighting between inmates and criminal law rules as to what is justifiable in self-defence should surely be applied in this prison context.

Counsel's participation would also have an important impact on the development of a "prison administrative law" by the Federal Court. Not only would counsel be able to frame the issues for judicial review in a manner the inmate could never do, but his arguments to the court, particularly on the issue of what decision should be exercised judicially, would be infused with an understanding of the prison disciplinary system. The lack of such understanding has, to date, undermined the validity of judicial reasoning in this area.

To test what might be the effect upon disciplinary proceedings of lawyers' participation, an experiment was held at the U.B.C. Law School in the form of a mock trial. The trial was based on an actual hearing at Matsqui where an inmate had been charged with disobeying an order arising from a series of incidents involving the loss of television privileges. Two members of the Vancouver Criminal Bar acted for the Institution and the inmate; the parts of the two guards who were primarily involved in the original hearing were taken by third year law students who had been employed as guards in a correctional institution and the writer took the part of the inmate. The information made available to counsel and the evidence presented by the guards and the inmate was taken from the transcript of the original hearing.

The major effect of the lawyer's involvement in the experiment was that there was a much more orderly presentation of evidence than had occurred at the original hearing, especially as to the proper interpretation of the word "order", and as to whether an order was made and, if so, whether it was disobeyed. There was, however, another surprising difference between the experimental trial and the original hearing. As a result of the way in which the lawyers channelled their questions very little opportunity was given to the inmate to go into detail about the cause of the whole incident.

¹⁴⁰ See *R. v. McLeod* (1954) 11 C.C.C. 106 and S. Berner, *The Defence of Drunkenness* (1972) U.B.C. L. Rev. 309.

¹⁴¹ The difference if anything is more relevant in the prison since assaulting a guard is perhaps the most heinous in the prison disciplinary calendar. Thus the only two cases of assault in the years 1969-72 where more than 30 days statutory remission were forfeited were assaults on guards (in the one case 60 days and in the other 90 days).

As the person playing the inmate I felt very frustrated at not being given an opportunity to have my say and it was clear therefore one of the essential functions of the disciplinary hearing had not been fulfilled. This suggests that any counsel participating in the disciplinary proceeding would need to develop, like the independent chairman, a sensitivity to the dynamics of the prison and its system of justice. I feel that a lawyer after some experience would be able to strike a balance so as to permit the hearing to be more informal than that of a regular criminal trial and yet bring to bear his forensic skills to achieve procedural regularity and reliability in factfinding and, to the extent that he participates a greater measure of uniformity in sentencing. Based on the Matsqui experience the number of cases requiring the assistance of counsel would not be large and extending legal aid to these cases could be easily justified in terms of their impact on the inmates life.¹⁴²

Part IV Prison Justice and Administrative Decision-making — The Due Process Model Applied

So far I have dealt with matters which are labelled as part of the disciplinary process. However, at Matsqui there are other areas of low visibility which, while not labelled 'disciplinary', are shaped by disciplinary considerations. An understanding of these areas is indispensable to a full appreciation of prison justice. I have therefore chosen to discuss two such areas — "non-punitive" dissociation and disciplinary transfer — which have the greatest impact on the inmate and demonstrate, in its clearest form, the discretionary power prison officials have over the lives of prisoners. My purpose is not only to make visible these areas but also to see whether the model of criticism and reform I have developed is equally relevant here to control such discretion and ensure fairness.

"Non-Punitive" Dissociation

Under the title of Non-Punitive Dissociation, section 2.30 of the Penitentiary Regulations¹⁴³ provides

- (1) Where the Institutional Head or his lawful deputy where satisfied that
 - (a) for the maintenance of good order and discipline in the institution or
 - (b) in the best interests of an inmate

it is necessary or desirable that the inmate should be kept from associating with other inmates, he may order the inmate to be dissociated accordingly but the case of every inmate so dissociated shall be considered not less than once each month by the Classification Board [now known as the Inmate Training Board] for the purpose of recommending to the institutional head whether or not the inmate should be returned to association with other inmates.

- (2) An inmate who is dissociated for the foregoing reasons is not considered under punishment unless sentenced as such and he shall not be deprived of his

¹⁴² As an alternative or indeed as a supplement, senior law students might be able to undertake the task of representation. Thus, at Matsqui, law students are already involved in legal aid clinics which could easily extend their services to representation in serious cases before the Disciplinary Board.

¹⁴³ S.O.R./62-90.

privileges and amenities by reason thereof, except those privileges and amenities that

- (a) can only be enjoyed in association with other inmates, or,
- (b) cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof.

At Matsqui, inmates placed in non-punitive dissociation under this provision are kept in the same cell block as those in punitive dissociation except that they sleep on a regular bed and keep their bedding during the day. Their cells have the normal built-in radio, they receive full reading privileges and can purchase items from the canteen although inmate informants indicated that there is a certain amount of difficulty in asserting these privileges during the first week of dissociation and even thereafter when certain guards are on duty. The inmate in non-punitive dissociation, however, like his brother in punitive dissociation, is required to have his visits behind a screen and is subject to the same very limited exercise period. Both labour under the major impact of dissociation — the massive denial of mobility and communication with other inmates.

Inmates were regularly placed in dissociation under s. 2.30 when they were charged with certain disciplinary offenses pending the hearing of the charge at the next sitting of the Disciplinary Board. This occurred invariably where the charge involved attempted escape, the use of violence or threatened violence, or refusing an order. Since at Matsqui the Board sat every week on Thursday this could involve pre-trial dissociation of up to six days. There is no requirement in the Regulations or Directives for any pre-trial hearing to determine the necessity for such dissociation nor was any conducted at Matsqui. At most, the A/D/D(S) reviewed the population in dissociation mainly in light of the purely administrative issue of space, that is, whether the cell the inmate occupied was required for another inmate who had a greater need for dissociation.¹⁴⁴

The fact that no criteria have been developed (save that of administrative convenience) to justify the intrusion into the inmate's already limited freedom on the basis of his having been charged with a disciplinary offense, does not of course mean that such detention could not be justified on proper criteria. What it does suggest is that the present directive which authorises dissociation for "maintenance of good order and discipline" is so vague as to permit or indeed invite abuse. One way of analysing the justification for pre-trial detention at Matsqui is to use the analogy of pre-trial detention in the regular criminal justice system. Such an approach is timely in light of the recent amendments to the Criminal Code which have attempted to deal with what was thought to be a similar abuse in pre-trial detention in the larger criminal justice system.

¹⁴⁴ This was dramatically illustrated on one weekend where an abnormal number of inmates were returned to Matsqui after having gone AWOL and, as a result of the pressure on the Special Correctional Unit, inmates who had been previously dissociated were released early Monday for no other reason than to make way for the returned inmates. Without that pressure there is no doubt that the original occupants would have remained in dissociation pending trial.

The framework of the new provisions is to require pre-trial release instead of arrest in certain less serious offenses unless the police officer has grounds to believe that arrest is necessary to establish the identity of the person, secure or preserve evidence relating to the offence, prevent the intimidation of witnesses or repetition of the offence or commission of another offense, or believes that the person will fail to attend in court. If an arrest is made, the officer in charge of the police lock up is required to review the matter in light of the same considerations. This part of the new provisions is clearly concerned with pre-trial detention in the immediate period after the apprehension of the offender. Other provisions deal with the question of pre-trial release after arrest and after any review by the officer in charge but prior to trial. Here it is provided that detention is only justified on the primary ground that it is necessary to ensure the accused's attendance in court, and on the secondary ground that it is necessary in the public interest for the protection or safety of the public, having regard to any substantial likelihood that accused will, if released, commit a criminal offense involving serious harm or an interference with the administration of justice.¹⁴⁵ It is these latter provisions which seem to be the ones most analogous to the question of pre-trial detention in prison since there we are mainly concerned not with the immediate period after discovery of the offense or apprehension of the offender but with the longer period pending trial.

If these criteria were applied to the prison, pre-trial detention could be justified in a variety of cases. While at first it might seem strange to suggest that pre-trial detention is necessary to ensure the appearance of an inmate for an appearance in a prison court, it must be remembered that federal penitentiaries are classified by reference to their security rating, and since Matsqui is classified as medium security, inmates sent there are not thought to be serious escape risks. The case can therefore be made that an inmate who is suspected of having attempted to escape requires tighter security until his alleged guilt has been determined. Such tighter security is what dissociation in the Special Correctional Unit at Matsqui ensures. Another example where pre-trial detention could be justified would be where an inmate has violently assaulted a guard or other inmate as a result of a dispute. It might be quite legitimate and prudent to dissociate an inmate who had used such violence to solve a grievance pending a determination of the issue at trial. Hopefully at the trial the matter would be aired and some peaceful resolution achieved. In relation to an assault on another inmate, dissociation might be premised not only on the likelihood of repetition but also to protect the accused inmate from retaliatory assault by other inmates.

In the most common case at Matsqui where pre-trial detention was used — disobeying an order — pre-trial detention should not normally be used except where there is a risk of repetition which might spread to other inmates and generate widespread disobedience. The great majority of the cases encountered involved only the particular inmate and permitting that inmate to remain in the population until his trial before the Disciplinary Board would

¹⁴⁵ R.S.C. 1970 c. 2 (2nd Supp.) s. 5, adding the Bail Reform Act to the Criminal Code.

not have undermined security in the institution. It may well be that the practice of resorting to pre-trial detention in these cases was due to the already noted perception of the custodial staff that, in the prison as in the military, it is necessary to ensure compliance with the orders of guards. Immediate dissociation of an inmate who is charged with such an offense is designed to reinforce this. As previously stated, this perception is misplaced in Matsqui and reliance upon the analogy of the regular criminal justice system would be more appropriate and would not compromise security interests.

There is a clear need therefore for the Directives to be amended to identify specific criteria for dissociation following a charge but pending a hearing before the Disciplinary Board. This need for specificity of criteria is based on two factors. First, there is some evidence that vague criteria justifying detention, for example, where "there is an immediate threat to the security of the institution" do not operate as controls on discretion.¹⁴⁶ Second, overprediction of violence or disorder and therefore overdetection is more likely (although more justified) in the potentially volatile nature of penal institutions than on the outside.¹⁴⁷ The criteria should only authorise detention where (a) there is grounds to believe that the offence, if proved, would lead to a change in the security rating of the inmate; (b) the offence involves actual or threatened violence to another person or incitement of other inmates and there is a substantial likelihood that the offence will be repeated or continued; (c) the offence involves the refusal to obey the lawful order of a guard or other staff member and there is a substantial likelihood that the refusal will lead to widespread disobedience by other inmates; or (d) the inmate at the time of being charged with an offence reacts in a violent or uncontrolled manner. In the last case the inmate should be released as soon as he has regained control and in the first three cases (and in the last if the inmate remains violent or uncontrolled) a hearing should be required within twenty-four hours of dissociation to review the need for dissociation in light of the criteria.¹⁴⁸ This hearing should be conducted under the same conditions as a disciplinary hearing i.e. with notice of the charge, a personal appearance and the right to cross-examine and call witnesses. There should also be a written record with reasons for the decision. While logically such a review can best be conducted by the proposed independent chairman of the Disciplinary Board, as a practical matter, it is highly unlikely that such a chairman would be available on such short notice. Under these circumstances a review by the Superintendent would be the procedure of choice. To require

¹⁴⁶ See the Harvard study, *supra*, note 66 at 205-7 where it was found that although regulations cast in this form were specifically designed to limit the use of pre-hearing detention, in fact the incidence of such detention after the introduction of the regulations remained the same.

¹⁴⁷ *Id.* at 206.

¹⁴⁸ Weekends and holidays may necessitate a forty-eight hour delay.

such a review by the Superintendent would not pose a heavy administrative burden having regard to the importance of the issue.¹⁴⁹

A further point relates not to the criteria for detention but the place of such detention — at Matsqui, the Special Correctional Unit. Except where the inmate is charged with an offence where incitement of other inmates was involved or where he was acting in an uncontrolled manner (so that he might destroy furniture) it is not clear why the inmate could not be confined in his own cell. Permitting him to remain in his own space would minimize the dislocating effects which the current manner of dissociation has and better accord with a proper balancing of the presumption of innocence and the need for pre-trial detention.

The second class of case in which pre-trial detention was used at Matsqui was where an inmate was awaiting trial on a charge in outside court. An inmate who while in prison commits an act which constitutes an offence under the Criminal Code is liable to be tried in the regular criminal court system. As previously outlined, Divisional Instructions seek to provide guidance to the Institutional Head in deciding whether the matter should be dealt with as a criminal offence in outside court or as an internal disciplinary matter. The Instructions also provide that while a decision on this is being made or if the decision is to proceed in outside court "the inmate may be dissociated pending disposition of the case if it is considered by the Institutional Head to be necessary in the circumstances".¹⁵⁰

Dissociation is here authorised on the vaguest possible criteria of what the Institutional Head considers "necessary". How was this interpreted at Matsqui? During the period of our observation some twenty inmates faced charges in outside court, three quarters of which involved escape or being unlawfully at large.¹⁵¹ The remainder of the cases consisted of several charges of simple possession and possession for the purpose of trafficking of heroin, a charge of rape and one of impaired driving, both of these last charges arising out of incidents committed during temporary absence passes. In all these cases except the impaired driving, the inmates were dissociated initially and in most cases continued in dissociation until final disposition of the charge. The decision to place the inmate in dissociation was in fact made by the A/D/D(S) and seemed to be based on the view that unless there were special circumstances the inmate charged in outside court should be dissociated pending trial. In other words there is a strong presumption in favour of dissociation. There was no hearing on the matter with or without the presence of the inmate. The length of time of such dissociation varied from one week to twelve weeks with the average period being two to three weeks. In several

¹⁴⁹ During the months of November and December 1972 an average of about 10 inmates were dissociated in any one week under the authority of section 2.30. This includes all cases not just pre-trial detention for Warden's Court.

¹⁵⁰ D.I. 300.03 para. 7(b).

¹⁵¹ An inmate is unlawfully at large as opposed to having escaped when for example he fails to return from a temporary absence pass. Divisional Instructions deal with the question at what point an inmate on temporary absence becomes unlawfully at large in light of policy and legal considerations. See Divisional Instruction 300.03.

of the cases involving charges of possession and trafficking the inmates were placed in dissociation immediately on discovery of the drugs and remained there for some three to four weeks before any charges were laid against them. Presumably here dissociation was based on the general power given under s. 2.30 of the Regulations. The explanation given for this dissociation was that it was necessary to let the inmate think about his predicament and give the institution time to look at the situation. It was also pointed out that dissociation was necessary since it was not known how serious a charge would be laid against the inmate i.e. whether it would be simple possession or trafficking. It is not unreasonable however to suppose that the police and local crown counsel, being fully aware that the inmate is in any event undergoing imprisonment, are not likely to be particularly hasty in having the necessary analysis done before deciding how to proceed. Certainly the delay in the decision to charge was inordinate by street standards.

A number of inmates who were on outside charges were in fact released from dissociation prior to the hearing of the charges against them. The circumstances of their release sheds light on the justification for their original dissociation. In the case of one inmate, charged with possession, his counsellor raised the question at the Inmate Training Board of whether it was necessary for him to remain in dissociation. Although this Board is required under section 2.30 of the Regulations to review the case of every dissociated inmate once a month this did not occur automatically at Matsqui. On this occasion after it was raised and it was pointed out that the inmate had already spent some twelve weeks in the "hole" the Board, after some very cursory discussion, decided that the inmate should be released back into the population. No reasons were given for this decision and from discussions with members of the Board after the meeting, it was clear that the counsellor had in effect asked for some positive reasons for dissociation which the Board was unable to supply. It suggests that had some positive reasons been required in the first place the inmate would never have been placed in dissociation at all.

It is clear therefore that in Matsqui pre-trial detention through dissociation is not based on any principled decision-making but is the reflex response of the institution. It should also be clear, more so than in the case of pre-trial detention pending a hearing before the Disciplinary Board, that the appropriate criteria for pre-trial detention on a charge in outside court ought to closely follow pre-trial detention criteria in the regular criminal justice system. The fact that an inmate is imprisoned certainly gives no justification for additional restrictions on his already limited liberty because of a pending charge, unless there are reasons which would justify restriction of "a free world" person's liberty faced with the same charge. Using such criteria, as with the case of pre-trial detention on Warden's Court charges, it is not difficult to see certain cases in which dissociation would be quite appropriate. A charge of escape would be one of these although this requires some qualification. While it seems that an inmate who has successfully escaped might require dissociation to ensure his presence at the trial on the basis that medium security is not designed for such inmates, I observed a number of cases where inmates charged with escape were dissociated pending trial and after being tried and receiving an additional sentence were permitted to re-

main at Matsqui and were not transferred back to the maximum security B.C. Penitentiary. This would suggest that the institution was either satisfied that the escape would not be repeated or that the inmate, although an escape risk, was not so serious a risk as to justify transfer in light of the pressure on space at the B.C. Penitentiary. On either basis it would be difficult to justify pre-trial detention for such an inmate. Another case where pre-trial detention would be justified would be an inmate charged with trafficking in heroin whom the institution reasonably believed would continue trafficking if permitted to remain in the population.

It is clear that the present provisions authorising dissociation for inmates facing outside charges need to be rewritten with more specific criteria similar to those used in the Criminal Code and that provision be made for a proper hearing to determine whether in light of those criteria dissociation is really necessary. Since, as with the other kind of pre-trial detention pending a hearing of the Disciplinary Board, there may be justification for a short period of dissociation immediately after the discovery of the crime or return of the inmate to the institution after an escape, the hearing should be held within 24 hours of the inmate's dissociation. While, again, the unlikelihood of having the independent chairman available suggests that the initial hearing be before the Superintendent, there is a strong case for the right to a subsequent review within five days before the chairman. This is not only because, if dissociation is permitted pre-trial, an extended loss of institutional freedom is involved, but also because the articulation of criteria in Directives may not alone, without implementation by the independent Chairman, be sufficient to displace the institutional presumption in favour of pre-trial detention.

The third class of case where non-punitive dissociation was used in Matsqui encompasses a fairly wide variety of circumstances. One such use was to facilitate a transfer to the B.C. Penitentiary. In a number of cases inmates who were to be transferred back to the maximum security institution and who had become aware of the transfer, or who the institution felt would become aware of the transfer through the prison grapevine, were placed in dissociation pending their transfer in order to minimize the risk of escape. Such use of dissociation is clearly a reasonable one.

A further use of dissociation was premised not so much on the maintenance of good order and discipline in the institution, as have been all the other dissociations considered so far, but on "the best interests of the inmate" which is an alternative basis for dissociation authorized under section 2.30 of the Penitentiary Regulations. This is done where an inmate would be under some threat from other inmates if he were to remain in the general population. It is used most commonly in maximum security institutions to segregate sex offenders who run considerable risks in prison from beatings by other inmates.¹⁵² During the period of my observations dissociation on this basis was only used on one occasion when an inmate, who happened to be a sex offender, handed in a gun he alleged he had discovered in one of

¹⁵² See A. Marcus, *Nothing is my Number* (Toronto: General Publishers, 1971).

the work shops. He was placed in dissociation for his own protection since both he and the institution considered that he was at risk from other inmates. The factor of the dissociation being partly at the request of the inmate was one which occurred in a number of other cases where inmates requested dissociation not so much for their own protection but because they felt on the verge "of blowing up". For the inmate who requests it, it does provide an opportunity to get away from contact and communication with other inmates.

I have reserved for last the use of dissociation which causes perhaps the greatest concern, although during the period of my observation it did not occur very often at Matsqui. The kind of case involved here was described in a report of the Canadian Penitentiary Service dealing with the practice of administrative dissociation at Kingston Penitentiary. Some of the inmates there had been kept in dissociation for what seemed to be disciplinary reasons but without being convicted of a disciplinary offense and for periods of time far in excess of the maximum dissociation period permitted by the Commissioner's Directives dealing with discipline.¹⁵³ The only case similar to this which the writer came across in Matsqui was one where an inmate was suspected of putting strong arm pressure on other inmates to bring drugs back into the institution and spent some six days in dissociation pursuant to section 2.30 although no disciplinary charge was laid against him and he adamantly denied the allegation. That there were not more cases of the kind mentioned in the Kingston report is not surprising in light of the fact that Matsqui is a medium security institution and inmates who are thought to be "troublemakers", but on whom sufficient evidence is lacking to charge them with any disciplinary offense, are usually dealt with by transfer back to a maximum security institution, an alternative which clearly is not available to a maximum security institution itself such as Kingston.¹⁵⁴

There is clearly great danger of abuse inherent in this use of administrative dissociation and the potential for using it for disciplinary reasons as in the case above mentioned is particularly disturbing. However the case for this administrative power even in these circumstances may be compelling. For example, the authorities may suspect that some inmates are bringing strong pressure to bear on a weak inmate to bring drugs into the institution; that suspicion may come from information provided by the weak inmate himself; if a disciplinary charge were to be brought the only evidence would be that of the other inmate who clearly would be very reluctant to testify

¹⁵³ The administrative dissociation in one of the cases mentioned in this report for a period of ten months was apparently based on a belief that the inmate had contributed to a sit down strike at the institution because of "tenseness" that developed from the Inmate's participation in the preparation of briefs to the Joint Senate and Parliamentary Committee on Corrections. For further reference to this report see Kaiser, *supra*, note 123 at 260.

¹⁵⁴ The problem of the institution's disciplinary response to events where there is insufficient evidence to invoke formal disciplinary proceedings is an important and difficult one out since at Matsqui it arises mainly in the form of transfer back to a maximum security institution. I will deal with it more fully when discussing the question of transfer.

against a fellow inmate. Dissociating the suspected inmates may be a reasonable response to this problem in permitting the Institution to investigate its suspicions while taking the pressure off the other inmate.

While recognising that there are legitimate reasons for administrative dissociation, other than in the pre-trial situation, the potential for abuse requires that the power be closely circumscribed. At the moment there are no real limitations on the power except that the Inmate Training Board is required to review every case of dissociation every month. This review is not taken very seriously at Matsqui and is not adequate.

What is needed here, as in the case of pre-trial detention, is a greater specificity of criteria for this exercise of the dissociation power in the Regulations and Directives and the provision of a real review in light of these criteria. A formulation which would be responsive to the range of legitimate concerns of prison administrators would permit dissociation (a) pending the investigation of possible charges where the inmate's presence in the population would constitute substantial risk of harm to others or of escape; (b) pending a transfer to another institution where the inmate's knowledge of such transfer would give rise to a substantial risk of escape; (c) where an inmate's presence in the population would expose him to the substantial risk of serious harm; (d) where an inmate requests such dissociation for reasons of medical or mental health. This is not meant to be an exhaustive list since it only includes what was seen as the range of concern in a medium security institution. It may well be that in a maximum security institution there are other legitimate concerns which call for a more open discretionary power. Assuming, therefore, that there will remain some open-endedness in the criteria, the need for adequate procedural checks and balances by way of review is particularly acute. One commentator has suggested that

If wide discretion for administrative dissociation is to be continued it would appear to be in the interests of all parties that such dissociation not continue beyond the 30-day period permitted for punitive dissociation without an order from the Solicitor General or Commissioner of Penitentiaries authorizing the continued practice stating the grounds and terms for confinement. That a copy of this order should be delivered to the inmate so confined goes without saying.¹⁵⁵

This suggestion still leaves the institution the power to impose as severe a penalty as it can under the formal disciplinary process without any procedural protection. To remedy this deficiency I feel that there should be a hearing within twenty-four hours of the dissociation before the Superintendent and a right of review within five days before the Independent Chairman of the Disciplinary Board to consider whether, in light of the alleged grounds for dissociation and the inmate's representations, there is cause for dissociation.¹⁵⁶

¹⁵⁵ Kaiser, *supra*, note 123 at 267.

¹⁵⁶ This proposal to check the dissociation power resembles, although it goes much farther than, the English Prison Regulations which provide that no prisoner shall be kept under restraint for longer than twenty-four hours without a direction in writing by a member of the Board of Visitors or by an officer of the Secretary of State and such a direction shall state the grounds for the restraint and the time during which it may continue. Prison Rules, S.I. 1964, No. 388, 1.46.

Since in many cases the grounds will be based on information which cannot be fully disclosed to the inmate (for example, names of informants) the independence of the Chairman plays a vital role here. All relevant information would be disclosed to him and his independence should provide the inmate with a measure of confidence that, while he is not getting a full hearing, unbiased scrutiny is being brought to bear on the claims of the institution.

Disciplinary Transfer

A problem similar to that posed by recognizing the need for administrative dissociation yet protecting it from abuse arises from the practice of transfer of inmates from Matsqui to a maximum security institution for disciplinary reasons. During the period of our observations a number of inmates were returned to the B.C. Penitentiary largely because of their alleged involvement in drug trafficking. While some of these inmates had appeared before the Disciplinary Board, charged with using drugs, in the case of other inmates no disciplinary proceedings whatsoever were involved. In any event, even for those who had appeared before the Board, the transfer was made not for use but for trafficking. At no time was any hearing held at which the inmate was present nor was he able to make representations in any other way. Indeed, the inmate was not officially told of his transfer until the day it was to occur, the premise being that notice of transfer might prompt an escape. Thus, the inmate faces the prospect of waking up in the morning at Matsqui to find that he is to be taken to the B.C. Penitentiary without being given any notice of the transfer or any opportunity to know and protest the reason for it.¹⁵⁷ In fact, the prison grapevine is such that inmates sometimes knew of their impending transfer even though no official notice was given to them prior to the transfer actually being effected. The grapevine, however, does not establish any pre-transfer hearing procedure with the institutional decision makers.

The inmate was not officially told of his transfer until the day it was to occur, the premise being that notice of transfer might prompt an escape. Thus, the inmate faces the prospect of being taken to the B.C. Penitentiary without any prior notice or any opportunity to know and protest the reasons for his transfer.¹⁵⁷ Inmates learned of their impending transfers sometimes, through the prison "grape-vine", but this does not provide for any pre-transfer hearing procedure with the Institutional decision making.

The transfer from Matsqui back to the penitentiary has a major impact on the inmate's life in terms of the extent to which his freedom is curtailed. The B.C. Penitentiary, like most maximum security institutions in Canada, is a fortress of a building nearly 100 years old, surrounded by high walls, and gun turrets, and with very rigid military regime. Inmates spend most of their time in their cells, eat their meals there and have very limited work

¹⁵⁷ It was not uncommon for an inmate's family to have journeyed the 40 miles from Vancouver to visit with him at Matsqui, to be then told that earlier that day he was transferred to the B.C. Penitentiary.

facilities or opportunities for temporary absence release. Matsqui is a modern building, there are a greater variety of inmate and rehabilitative activities, the inmates have a good deal of mobility within the institution, meals are eaten in a communal dining hall and there is considerable free time in the evenings particularly during the summer. The time Matsqui inmates spend in their cells is less than half that of their brothers in the B.C. Penitentiary. Whereas visiting at the Penitentiary generally takes place through a screen, open visiting is the general rule at Matsqui. In addition, the chances of a parole are considerably greater for an inmate in Matsqui.

Clearly then the decision to transfer from Matsqui to the Penitentiary is one of the most important decisions which can be made from the inmate's point of view. To make such a decision on the basis of suspected misconduct, whether that conduct be a violation of the Criminal Code or of the prison disciplinary code, in lieu of the formal disciplinary process, without giving the inmate notice of the allegations, an opportunity to confront his accusers and present evidence on his own behalf, represents an important violation of due process of law.

A case the writer has been involved in at Matsqui illustrates the unfairness and denial of justice the present transfer procedure can involve. The inmate concerned, a convicted murderer, while in a minimum security institution was alleged to have knifed another inmate. No formal proceedings, either in disciplinary court or in outside court were brought, apparently because the victim was not prepared to testify against his alleged assailant. The inmate was transferred back to the B.C. Penitentiary four days later. The Director placed on file a written report in which he stated that, based on his interview with the victim (who orally named the inmate as the assailant) and his behaviour following the incident ("he spent the morning going from one jailhouse lawyer to another requesting advice and when questioned about it refused to even comment . . . or give any accounting of his actions") he had little doubt about the inmate's guilt and that "he must, under these circumstances, be considered a danger to society." Two years after this incident, the inmate, now in his tenth year of imprisonment, became eligible for parole. The Parole Board pointed out to him that his chances of favourable consideration by the Cabinet¹⁵⁸ were low unless he could establish his innocence of the charges. Suggestions were subsequently made that he take a lie detector or submit to a truth serum. I submitted that these suggestions involved the heretical position that a man standing accused of a serious criminal charge was required to prove his innocence and that the acceptance by the Penitentiary and Parole Services of his guilt, without any formal adjudication, not only deprived him of the presumption of innocence but also denied him due process of law. I requested that criminal charges be laid against the inmate to afford him, at this late stage, due process. So far this has not been done and the Penitentiary Service position is that, at this point in time, his acquittal would probably be assured because of the difficulty of securing the testimony of the victim and that therefore

¹⁵⁸ Parole of murderers can only be granted by the Cabinet.

this would not establish his innocence. Thus, because of a perceived reluctance of the victim to testify in a formal proceeding (a reluctance never actually tested) and the fact that punitive transfer without any procedural protection was possible, this inmate stands convicted of what amounts to, according to the institutional file, attempted murder without even the most rudimentary hearing or opportunity to defend himself.

To avoid such an obviously unfair situation it is suggested that wherever transfer to a maximum security institution is invoked as an alternative to the formal disciplinary process, the inmate be given notice of the allegation and a hearing before the independent chairman at which he is afforded notice of the allegations against him and the right to cross examine and call witnesses. Anything less not only fails to reflect the important deprivation of liberty which the decision to transfer involves for the inmate but also invites subversion of the due process embodied in the formal disciplinary procedure by administrative transfer.¹⁵⁹

One important problem which must be considered is that the need to transfer is often based, according to institutional staff at Matsqui, on information which is "confidential", coming from informers, particularly inmate informers, who would be exposed to a real risk of retaliation if their names were revealed. While this is a legitimate concern there is an equally real risk of error in relying upon such secret information with no opportunity for its challenge. The writer was told by inmates at Matsqui that both the institutional staff and the inmates themselves are constant victims of prison rumors about inmates, which in many cases are started to make trouble for these inmates. Providing a pre-transfer hearing will introduce the concept of notice to an inmate of the suspicions which, in the institution's eyes, justify his transfer, but if he is not told the source of the information and its exact nature it may be very difficult for him to present any real defense.

A solution to this problem of reconciling the institution's interest in maintaining confidentiality of the sources of certain kinds of information and the inmate's interest in a fair hearing, which has already been canvassed in relation to dissociation, arises from the special role of the independent chairman. This official could be presented with all of the institution's information, including confidential material and could make a judgment as to the reliability and, in light of other non-confidential corroboratory evidence, the justifications for keeping the information from the inmate. Since it could be expected that the claim to confidentiality would be readily made and since it makes it more difficult for the inmate to answer the charge, Directives should clearly establish a presumption in favour of disclosure of all information to the inmate, leaving the institution with the burden of establishing the need to maintain confidentiality in the particular case. Such

¹⁵⁹ It would seem that this possibility of abversion lies partly behind the U.S. decision of *Gomes v. Travisono* 2 Prison L. Rpt. 125 (1973) where a Federal District Court Judge held that since due process safeguards were required for disciplinary hearings the equal protection clause of the Fourteenth Amendment of the U.S. Constitution required similar safeguards for inmates whose transfers were triggered by a disciplinary violation.

a procedure, while recognizing a claim to confidentiality, would allow for case by case scrutiny and where, the claim is upheld, and inmate access to the information refused, there would at least have been an evaluation by an independent judge.

Apart from cases where the transfer decision is based on information that is of a confidential nature, there are also transfers based upon suspected misconduct of the inmate where giving the inmate full opportunity to confront his accusers would not undermine the safety of another inmate or compromise any other important interest of the institution, apart from the security interest that is necessarily involved in giving an inmate notice of his transfer. An example would be a case where the inmate is suspected of trafficking in drugs based on reports from officers that drug users were seen near the suspect's cell when there was "activity" in the Institution known to be associated with a shipment of drugs. It may be that the inevitable price to pay for giving notice and a hearing on a transfer back to the Penitentiary in all cases, whether involving confidential information or otherwise, is that if the transfer is confirmed after the hearing, the inmate would have to await the transfer in dissociation. This result, however, provided it is preceded by adequate notice and a hearing before an independent official of the kind outlined, would be a fairer balance of the competing interests than the present procedure.

The question of whether due process safeguards must precede a transfer of an inmate to a maximum security institution where that transfer is based on disciplinary grounds was recently considered by the Ontario High Court in *Re Greene and Faguy et al.*¹⁰⁰ The facts of that case highlight very well the problem involved in disciplinary transfers. The applicant had been an inmate at the medium security institution of Joyceville when he was transferred to the maximum security Millhaven Institution without a hearing, trial, confrontation with witnesses or other investigation. He alleged that the basis for his transfer was that he was alleged to have been involved in "nefarious" activities, i.e. extortion and use of "strongarm tactics" while in Joyceville. He had written the Commissioner of Penitentiaries requesting a hearing on the grounds that the basis for his removal was not founded on fact and subsequently the R.C.M.P. conducted some investigation. The applicant sought a writ of mandamus to require the respondents

to proceed by law, to confirm or disconfirm their allegations or suspicions and for such other order as seems just in the matter of an accusation prosecuted without trial or *in camera* by the respondents and such prosecution did affect the welfare of the applicant . . . by punishment directly interfering with the applicant's rehabilitation . . .¹⁰¹

Lerner J. dismissed the application on the technical ground that if the applicant had any rights they lay under section 18 of the Federal Court Act which he regarded as an absolute bar to the application in the Ontario High Court. However the judge in the course of his judgment stated, purporting to follow the *Beaver Creek* decision, that any decision that affects the civil

¹⁰⁰ [1972] 3 O.R. 395.

¹⁰¹ *Id.*

rights of the prisoner, for example, the alteration of the locale or nature of the confinement, was the exercise of a power by its nature judicial and suggested that counsel for the respondent (the Commissioner of Penitentiaries) give consideration to determine whether in a matter such as that before the court the Institutional Head or the Commissioner was acting judicially and if so whether the basic principles of fundamental justice as set out in the *Beaver Creek* case were observed.

Although Lerner J. purports to be adopting the *Beaver Creek* classification of what decisions affect the inmates' civil rights, the Ontario Court of Appeal in that case clearly stated that a decision which affected only the alteration of locale of imprisonment (such as a transfer from one institution to another) was the exercise of an authority which is purely administrative. I have previously suggested that the *Beaver Creek* classification of decisions administrative and decisions judicial does not take account of the realities of prison and although Lerner J.'s view may be in error as a matter of judicial construction it clearly has much to commend it in light of the impact a transfer to maximum security decision has upon the inmate's institutional freedom.¹⁶² However, the analysis I have made of the transfer decision indicates that a court, not bound by *Beaver Creek*, in deciding what principles of fundamental justice should be applied to the making of such a decision, must be sensitive to the real interest of the institution in the confidentiality of certain information. Simply classifying the matter as judicial and requiring full due process would be as unresponsive to the complexities and realities of decision making in prison as is the present approval of classifying it as administrative and requiring no due process.

Part V An Alternative Approach to Reform — The Negotiation Model

So far in this analysis I have characterized the prison disciplinary process as part of a continuum of the adversary criminal law system. Consequently, criticisms and recommendations for reform have been made within that framework, relying heavily on the traditional protections of due process of law. Professor Fred Cohen, a thoughtful commentator on developments in the Prisoner Rights area, has suggested that the adoption of procedural due process as the strategy of choice for controlling the discretion of prison officials is an example of the "umbilical tie" lawyers have to the use of analogy. Since due process is required in other areas of criminal law to ensure fairness, it is necessary in the area of prison discipline. Cohen sug-

¹⁶² However, a recent U.S. decision supports not only Lerner J.'s view of the reality of the transfer process but also may lend credence to his interpretation of *Beaver Creek*. In *Gomes v. Travisono*, *supra*, note 159. Pelting C.J., in holding that the transfers of inmates to out-of-state prisons had to be preceded by due process safeguards, documented how "transfer radically transforms an inmate's life" (at 184). In particular he noted that such transfer had the result of reducing the inmate's chances of rehabilitation and parole and therefore may well lead to a longer period of incarceration than would otherwise be the case (at 185). Since transfer to maximum security assuredly reduces rehabilitation and parole chances it can be argued that such transfer is properly viewed as one prolonging the period of imprisonment and therefore is a judicial decision within *Beaver Creek*.

gests that one of the traps of "excessive reliance on analogy is the limitation it imposes on the development of more creative solutions to the problem and the apparent tendency to accept on faith the inherent worth of the missing factor [of due process]".¹⁶³ While I have attempted to probe rather than accept on faith the relevance of due process protections in the particular context of the prison, are there in fact other ways of characterizing the disciplinary process and other methods of handling offences against institutional law and order which are more responsive to the special nature of the prison community? Already in Canada there have been experiments exploring the use of non-adversary procedures to deal with minor criminal behaviour by utilizing local conciliation committees.¹⁶⁴ Are similar experiments possible and desirable in the prison?

Perhaps the most useful framework for an analysis of alternative models is to be found in what has been characterized as the "Family Model" of the criminal process. John Griffiths, in his article outlining the contours of this model,¹⁶⁵ views it as being ideologically different from the adversary or "Battle Model" of that process. The traditional model is based on the concept of a battle with competing contestants struggling for the balance of advantage through appeals to alternative formulations of the model, in the one case emphasizing crime control, in the other, due process of law. In this battle the interests of the combatants are viewed as irreconcilable. In the first part of this study a battle model of the disciplinary process was accepted and the major criticism made was that the battle was weighted on the side of the institution through inadequate due process protections.

The Family Model has a number of characteristics which readily distinguish it from the Battle Model. What gives the Battle Model its distinctive character is what is called by Griffiths the "exile" function of punishment.

Based upon the conception of the criminal as a special kind of person who is "the enemy" of society, and of the trial as a battle in which (if guilty) he is vanquished, the exile function of punishment cuts him off sharply at that point from the total community. The main purpose of penal institutions is to keep him out of sight and out of mind. Apart from some residual hostility, our attitude, after his conviction stamps him with this special status, is one of indifference to his fate.¹⁶⁶

Under the Family Model "offender" and "offence" are not seen in this isolated, discreet way.

Offences, in a family, are normal expected occurrences. Punishment is not something a child receives in isolation from the rest of his relationships to the family; nor is it something which presupposes or carries with it a change of status from "child" to "criminal child". When a parent punishes a child, both parent and child know that afterward they will go on living together as before.

¹⁶³ F. Cohen, *The Discovery of Prison Reform* (1971) 21 Buffalo L. Rev. 855 at 868.

¹⁶⁴ See e.g. J. Hogarth, *Alternatives to the Adversary System, in Social Change and the Law* (1972).

¹⁶⁵ *Ideology in Criminal Procedure, or A Third Model of the Criminal Process* (1970) 79 Yale L. J. 359.

¹⁶⁶ *Id.* at 379.

The child gets his punishment as a matter of course, within a continuum of love . . . and he is punished in his own unchanged capacity as a child with failings (like all other children) rather than as some kind of distinct and dangerous outsider . . .¹⁶⁷

We could sum up the difference in attitude towards the accused which separates the Battle from the Family Model in terms of their respective contemplation and non-contemplation that, if convicted, he will suffer a fundamental breach in the ties of love, respect and concern that normally bind members of a society to one another.¹⁶⁸

A further feature of the Family Model separating it from the Battle Model is its premise of reconcilability of interest. Now, as Griffiths explains, reconcilability in a punishment situation cannot mean harmony or identity of interest. Reconcilability, if it exists at all, must be consistent with some conflict, or at least difference of interest.

Reconciliation takes place in the Family Model particularly in the energetic pursuit by a society of the convict's interest in every way consistent with the social need that he be punished. His sacrifice for the general good is kept to a minimum. The experience is made as painless and as beneficial for him as possible. In concrete ways we can make plain that he has transgressed, we do not therefore cut him off from us; our concern and dedication to his well-being continue. We have punished him and have drawn him back in amongst us; we have not cast him out to fend for himself against our systematic enmity.¹⁶⁹

A third difference lies in the view taken towards abuse of power. The Battle Model assumes that substantive conflicts of interest necessarily demand a process in which hostile parties do formal battle with rough equality under the rules or intolerable abuses of power will occur. The Family Model assumes that such abuse is a discreet problem manifesting a special pathology of particular families, not an analytically necessary consequence of the unavoidable conflicts between the interests of parents and of children which require a general restructuring of family life. Conflicts of substantive interests can, under the Family Model, co-exist with an adjudicative process built upon respect and continuing concern.

Is the Family Model of the criminal process relevant to the adjudication of the conflicts of interests thrown up by the prison? In other words, are the assumptions upon which a Family Model is based reflective of the realities of the prison community in the same way as they are reflective of the family community? In posing this question it is important to bear in mind that we are not necessarily considering the applicability of the Family Model in a pure form. As Griffiths admits, in a pure form it would not be a workable structure for any kind of mass social life but what we can do is place "criminal law [and disciplinary] systems on some kind of spectrum leading in that direction."¹⁷⁰

Certainly, an inmate who commits a disciplinary offence is generally speaking not exiled but his punishment takes place on the basis of his con-

¹⁶⁷ *Id.* at 376.

¹⁶⁸ *Id.* at 386.

¹⁶⁹ *Id.* at 411.

¹⁷⁰ *Id.* at 412.

tinuing as part of the prison community. To be sure there are exceptions to this; in some cases an inmate may be transferred to another institution and a sentence involving confinement in the Special Correctional Unit could be viewed as a form of exile within the prison community. But by and large, as when a parent punishes a child, so with the institutional staff and inmate, the expectation is that they will continue to live together under the same roof. Moreover, the specific nature of many of the punishments in prison seem analogous to those normally employed in the family context. Thus, downgrading, (involving loss of limited spending money) early lockup (resulting in loss of recreation time), the cancellation of temporary absence passes to visit outside the community and the requirement to do extra work without pay, readily evoke similar punishments most of us know as part of our own family contexts. Even being confined to the Special Correctional Unit might be equated to being sent to one's room, although most inmates would regard this as stretching the analogy beyond the limits of credulity. This last punishment and one involving loss of statutory remission are really in fact the only punishments regularly inflicted in prison which have no equivalents in family life.

A vital part of the Family Model is its assumption of reconcilability of conflicting interests. Is there such reconcilability in the prison system? The interests of prison administrators may be stated in two ways. In the wider sense it is that of protecting the public by maintaining the secure custody of inmates (fulfilling the exile function of punishment) and effecting their rehabilitation. In a narrow sense the interests can be seen as the smooth and orderly internal management of the prison so that the administration's policies geared toward security and rehabilitation can be furthered. The interests of inmates lie in preserving their individuality, dignity, self respect, freedom of choice, in minimizing arbitrary punishment and in maximising opportunities for freedom in the form of temporary absence passes and parole.¹⁷¹

A consideration of the issue of reconcilability of interests is related in part to the applicability in the prison of the last major premise of the Family Model, that abuse of power is not endemic to the institution but is abnormal, occurring only in certain dysfunctional units. In the prison the institutional staff, particularly guards, like parents, have a great amount of power over their charges and the exercise of that power is one of low visibility fairly well veiled from public and official scrutiny. However, unlike parents, the prison guard is not noted for a love of and respect for his charge.

¹⁷¹ Conflict of interests do not exist only as between the prison administration on the one hand and inmates on the other. It also exists within each group's own set of interests. Thus, there is a clear tension and in many cases open conflict between the institutional interests of "custody" and "rehabilitation". See D. R. Cressey, "Limitations of Organization of Treatment in a Modern Prison," in R. A. Cloward, *Theoretical Studies in Social Organization of the Prison* (New York: Soc. Sc. Res. Council, 1960) at 70. Inmates' interests also have internal conflicts. Thus, if obtaining a limited amount of freedom through a temporary absence pass requires conforming to a counsellor's view of what is a desirable change of attitude, this may represent to the inmate a loss of self-respect and dignity if he really disagrees with the counsellor's view. An inmate becomes involved in presenting a false self to the counsellor in order to win the fruits of the system.

There is also the further difference that the parent's role is cast in the positive terms of providing models for the child's values and behaviour and affection and stimulation to elicit his growth, whereas the guards' function, at least as defined by the guards interviewed, is seen in negative terms, that of preventing escape and minimizing disturbance. In any event, it is certainly clear from conversations with inmates and from the stories they tell that abuse of power within the prison is not viewed as the abnormal event it is in the family. We must, therefore recognize important reality factors in the prison as it is now constituted which militate against reconcilability. Inmates at present define the prison in terms of an embattled system, one of "us" against the "joint". Guards are referred to as "bulls" in the same way that policemen are referred to as "pigs". From many hours of conversation with inmates it seems clear that their commitment to battle is not simply intellectual but also emotional, reinforced through the solidity of the inmate society.¹⁷² It is also the writer's impression that for many guards the emotional commitment to a Battle Model is just as ingrained.

While this reality is a very important one, it is of course, based and in large measure reinforced by the way prisons are presently organized. Since we are here talking of alternative models it is legitimate to explore where reconcilability of conflicting interests may be possible on the assumption that certain changes can and will take place in the structure of the prison. Accepting therefore a potential for change let us see to what extent such reconcilability can exist.

The institutional interest in rehabilitation may appear to be one which is readily reconcilable with inmates' interests in that its successful pursuit effectively precludes any involvement with the criminal law and the prison and thus the inmate's interest in self-respect and in maximizing his freedom will be achieved. However, to draw such a conclusion assumes far too much about the concept of rehabilitation. The stark reality is that we still know little about what contributes positively toward rehabilitation. Such knowledge as we do have suggests that imprisonment has negative effects¹⁷³ and therefore, what we mean when we talk of rehabilitation are the techniques currently directed to minimize the negative effects of imprisonment on the rehabilitative process. To the extent that these techniques involve counselling by "professionals" which aims at inculcating values of the dominant society and producing attitudinal and behavioural change consistent with those values, an inmate who has rejected these values, either because of ideological convictions or worldly experience that they are irrelevant to the particular section of the community in which he has been brought up and lives, finds himself in an irreconcilable situation. However, if the techniques are designed to provide avenues for emotional growth, exploration of alternative non-criminal life-styles which satisfy the individual's need for initiative and control over what he does, and encouragement of a sense of responsibility

¹⁷² There is an extensive literature on the theme of solidity of the inmate society. See e.g. D. Clemmer, *The Prison Community* (New York; Rinehart, 1958), G. Sykes, *The Society of Captives* (Princeton: Princeton University Press, 1958).

¹⁷³ See e.g. K. Jobson, *Imprisonment* (1971), 4 Ottawa L. Rev. 421.

for and participation in life choices, then these are readily reconcilable with the inmate's interests in individuality, dignity and freedom of choice.

Turning to the reconcilability of the institution's interest in the orderly management of the prison and the inmates' interests, it is fairly clear that the traditional concept of institutional order has relied upon highly regimented schedules, strict dress codes and restrictions on communication and mobility amongst inmates, all of which are designed to make the custodial job as automatic and predictable as possible, and all of which run headlong into conflict with the inmate's desire to maintain his individuality, dignity and freedom of choice. To consider the issue of reconcilability in this area, I propose to re-analyse a number of the rules that form the fabric of institutional order within the Canadian Penitentiary System in general, and at Matsqui in particular, to see if the rules represent standards based on solely institutional interests or whether they also embody or with some modification could embody inmate interests as well.

There are some rules which clearly are designed to protect both sets of interests. Thus the rule against assaulting an inmate or an officer is clearly based on everyone's interests to be free from invasions of physical integrity. Again the rule prohibiting disrespectful or insulting behaviour, being designed to secure harmonious and peaceful relations, is in the interest of everyone living in the prison community. Unfortunately at Matsqui the rule is selectively enforced against inmates; guards can and do violate the rule with relative impunity. Only in a clear and aggravated case is the rule enforced against a guard. Reconciliation here requires no more than holding guards, like inmates, accountable for actions which disrupt the harmony of the community in this particular way.

Another rule where reconciliation would be possible but which under present conditions is not achieved is that requiring an inmate to work. This rule is clearly in the institution's interest since it can be argued that keeping inmates occupied by work avoids their spending all their time reinforcing each other's "deviant" value systems and planning escapes and other violations of institutional order. Also to the extent that the work involves self-maintenance of the institution it has budget-reducing advantages. At a more lofty level the requirement that inmates work may contribute towards rehabilitation in training men for socially acceptable work roles. The inmates too have an interest in keeping their minds and bodies occupied and in working on an assignment that is economically rewarding, intellectually or physically stimulating, in which they have an opportunity to make choices both in the initial work assignment and in its manner of execution, that is, one in which their interests in individuality, freedom of choice and participation are furthered. The reality at Matsqui, as explained earlier, is that no job is economically rewarding on any scale referable to work in the outside community. The choice of work is within a narrow range of mainly physical skills and while inmates can express a choice between these, that

choice is not in any way conclusive of their work assignment since the availability of space is the prime consideration. Inmate participation in decisions concerning the type of work to be done in a particular shop and the allocation of tasks within that shop is minimal. Also, a large percentage of men are employed in menial kitchen and institutional cleaning activities which result in the acquisition of skills which few of us would willingly pursue as our life work.¹⁷⁴

Reconciliation of these conflicting interests is not difficult to envisage. It would involve drastically expanding the range of choices of institutional work. An example of how this could be done at Matsqui would be to permit men to work at a variety of craft skills. At present men are permitted to do this in their free time as "hobby" work. With a few exceptions it is not however legitimated as work for full-time employment and yet it is clear that increasing numbers of people in the outside community are earning a livelihood from such craft skills.¹⁷⁵ Other possibilities would be to explore the needs of the particular community in which the prison is situated to ascertain what services or goods are not sufficiently available and to invite inmates to attempt to fill the gap. This would involve the inmates in a good deal of creative activity and would give, and in fact require, the development of responsibility and participation in decisions affecting the work. Another alternative lies in inviting private businesses to establish branches within prisons through subsidies in the form of capital equipment or tax benefits. The employment opportunities created by such prison branches could also be open to employees from the local "free" community which would have the double effect of not only nourishing both the local and prison economy but also of reducing the exile function of imprisonment.¹⁷⁶ For inmates whose security position warrants their being let out of the institution on temporary absence passes the range of job opportunities beyond those traditionally accepted as legitimate by the Penitentiary Service is subject only to the limits of the creativity of inmates and those members of the penitentiary staff charged with animating such programs.

Another avenue for reconciliation of interests would be the development of a realistic system of financial rewards for work done. The introduction of a proper wage system in the prison would both further the institution's rehabilitation goal in encouraging inmates to take responsibility for their own lives and accord with the inmates' demand for such responsibility. To

¹⁷⁴ Of the 300 men in Matsqui one third are employed in the kitchen or in institutional cleaning.

¹⁷⁵ Commissioner's Directive 317, dated June 19, 1972 authorises the development of arts and crafts as part of the overall inmate training program and states that such programs shall generally be conducted during leisure time but selected activities may be conducted as a special part of the work program where approved by the Institutional Head. No such activities have been approved at Matsqui.

¹⁷⁶ For a discussion of the idea of prison branches of private industry, see, N. Singer, *Incentives and the Use of Prison Labour* (1973), 19 *Crime and Delinquency* 200.

the extent that work activities can be generated which benefit both the community and reflect the inmate's interests the prison will be brought closer into the larger society and its exiling tendencies further undermined.¹⁷⁷

There are however examples of rules of institutional order which do not permit such reconciliation of competing interests. Perhaps the best and most important example in the context of Matsqui is that involving use of drugs. As we saw earlier there are a variety of bases for the institution's interest in prohibiting drug use related both to rehabilitation (drug use reinforces a deviant sub-culture) and security (it involves trafficking with attendant strongarming and exploitation.) From the inmate drug user's perspective it would appear at first blush that rationally his interest is against using drugs inside the institution because in light of the present state of the law his drug habit, if continued, will result in his recurring imprisonment. The fatal flaw in this line of argument is that the interests of the inmate/addict in relation to his drug use are not defined *rationally*. His interest is to get drugs from whatever source available and that interest is defined by reference to the physiological and psychological need that is drug addiction. There is also the important point that long-term addicts have built up a sense of personal integrity around their drug use and fiercely defend it. At Matsqui a number of inmates who have been addicts for ten to twenty years openly rejected the notion that an addict is a "sick" person and consequently resented the compulsory intervention of "treatment" staff whose aim is to help them get over their addiction problem. They do not define themselves as sick and are confident that if the law were changed to permit them legally to receive a maintenance dose along the lines of the English model they would be able to function within the lawful demands of society. Moreover they feel that the law will be changed along these lines. Whether their judgment in terms of the dynamics and politics of heroin addiction is right is not the point. The point is that they feel this way and consequently repudiate the illegitimacy which the institution stamps on their drug use through punishment. Because of these factors it is the writer's view that a rule requiring total abstention from drugs in the institution results in a situation not just of conflicting but irreconcilable interests. Partial reconciliation is possible by abandoning the exceptional rule of penalizing drug use and relying upon the normal criminal sanctions of possession. This would include abandoning the use of urine analysis for the purposes of obtaining evidence for conviction in disciplinary court. This however may not represent an acceptable reconciliation from the institution's point of view and it is better perhaps to justify the abandonment of urine testing for punishment purposes along the lines suggested earlier in the paper, based on its unreliability and arbitrariness as administered. Drug

¹⁷⁷ If realistic financial rewards are made available for meaningful work it is likely that reconciliation is possible even in relation to the menial institutional tasks. It is clearly in inmates' interests to spend their time in a livable environment and to be fed decent food. Given the fact that the Penitentiary Service is unlikely to contract out these tasks to non-penitentiary personnel, a reasonable reconciliation would be for inmates to do these jobs themselves recognizing that many inmates regard them as unpleasant and reflecting this in the wage structure together with perhaps rotation of men through this kind of work. Alternatively some inmates who like the work could undertake it as their long-term institutional work assignment with suitable compensation.

use then would appear to be properly viewed as an example of a rule involving irreconcilability of interests and therefore its adjudication and punishment is ill suited to a Family Model.

It will be readily apparent from the discussion of the question of reconcilability of conflicting interests under a Family Model that part of any such model in the prison setting involves the concept of bargaining. That informal bargaining, often tacit and implicit, goes on in the prison between inmates, guards and counselling staff is quite clear.¹⁷⁸ The inevitability of such bargaining has been said to be based on the fact that administrators rarely have sufficient resources to gain complete conformity to all the rules. An insufficient number of guards and inadequately threatening punishments create the environment in which institutional rules are often ignored. At the same time the attempt to impose order upon individuals deprived of normal amenities and often lacking opportunities for adequate recreation or privacy, tends to produce violent disorder. Taken together, the scarcity of enforcement resources and the pressures of confinement result in the necessary toleration by correctional administrators and guards of constant violation of institutional rules. The manner in which this tolerance is allocated among inmates depends fundamentally on what may be termed "bargains", often tacit and implicit, by which enforcers attempt to gain maximum conformity given their limited resources and the inmates attempt to gain maximum tolerance for their breaches of institutional rules. Recurring contact between guards, counsellors and inmates creates ample opportunity for an ongoing informal bargaining process directed to these ends.¹⁷⁹ The willingness of the correctional officer to tolerate under the surface violations amounts to a kind of custodial "largesse" which can be distributed in a highly particular manner to selected inmates. It is likely to be allocated most generously to inmate leaders who have a degree of control over other inmates. While this informal bargaining permits the maintenance of a surface order it has been suggested that such private bargaining compromises important correctional goals. Reich explains this:

Rehabilitation programs are designed *inter alia* to move the inmate from his position of powerlessness and vulnerability within the inmate society (or maybe society at large) and to provide him with new models, thus encouraging dignity, self-respect and personal responsibility. Treatment often depends upon the development of trusting frank relationships between the inmate and the treatment staff. But private bargaining tends in the opposite direction. Bargaining over custodial largesse reinforces a sense of powerlessness for most inmates since they depend upon leader inmates to gain advantages or avoid violence. The process of carrying on "illicit" activities forbidden by prison regulations also serves to reaffirm the inmate's own deviant self-image; their goals and methods are as illegitimate as they were outside the prison walls and they still think of themselves as violators of social norms. The bargain itself proceeds in an atmosphere of mistrust and suspicion — lines of communication are selfishly guarded by

¹⁷⁸ For an excellent analysis of this area and full citation to supporting literature see C. R. Reich, *Bargaining in Correctional Institutions: Restructuring the Relations Between the Inmate and the Prison Authority* (1972), 81 Yale L. J. 726 (1972). See also A. F. Rutherford, *Formal Bargaining in the Prison: In Search of a New Organizational Model* (1971), 2 Yale R. of Law and Soc. Action 5.

¹⁷⁹ Reich, *supra*, note 178 at 727-728.

leader inmates, correctional officers refuse to acknowledge the fact that violations are occurring, and the maintenance of surface order requires low visibility collusion and relative secrecy. Most importantly, and most damaging to the goal of rehabilitation, inmates are taught that what is most rewarded is physical strength, intimidation and exploitation. . . .

[Also] the maintenance of any real institutional order . . . is made more difficult by private bargaining . . . Private bargaining encourages the maintenance of strong inmate organization capable of reacting quickly and uniformly. Although held together by bribes and force, the bargaining ability of the entire network, as expressed through its inmate leaders, depends upon maintaining the highest possible threat of disruption or violence by the inmate society. . . . The use of selected discretion by correctional officials officers in deciding whom to bargain with may aggravate a sense of injustice felt by inmates who do not enjoy the benefits of discretion. The tensions and suspicions generated in such an atmosphere make even inadvertent action by correctional officers seem to inmates to be instances of purposeful harassment. . . . Rather than contributing to the personal safety of inmates, private bargaining may actually result in more internal violence than if no bargaining were to occur. Competition for leadership and control may provoke minor warfare between factions. More significant is the fact that private bargains enable and encourage certain segments of the inmate society to control other segments by force and violence with full toleration of the correctional staff. Members of the inmate society with the least to bargain not only bear the full weight of official enforcement but are also deprived of protection from the more or less constant but low level use of force against them by other more powerful inmates.¹⁸⁰

Reich maintains that formal bargaining involving negotiations with the entire inmate community will better achieve correctionals goals.

"Formal bargaining may be an important rehabilitative device for a number of reasons. First, in contrast to private bargaining where inmates learn that bullying and brute force pay off, formal bargaining rewards negotiation and compromise. Through formal bargaining inmates may learn how to solve problems, maximize gains, articulate goals, develop alternative strategies and deal with opponents without resorting to force or violence — techniques and skills directly applicable to lawfully satisfying their wants outside prison walls. Second, unlike private bargaining in which deals are illicit and the inmate's deviant self-image is reaffirmed, formal bargaining legitimizes many of his goals and interests and provides him with an official means for achieving them. Thus through formal bargaining the inmate may gain some degree of dignity and self-respect, achievements which are also important for getting along outside prison. Third, formal bargaining may encourage a sense of responsibility and participation. While under private bargaining inmates are often dependent for amenities upon a hierarchical system of rewards, and getting along in prison is conditioned upon taking orders and not questioning authority, within the formal bargain inmates will be encouraged to examine institutional policies and take initiative in negotiating change. Attitudes of self-confidence and the skills of critical judgment, important when the inmate leaves the prison to carve out a new life for himself, would in part be developed within the process of formal bargaining.¹⁸¹

Although prison administrators seem to feel that formal bargaining

¹⁸⁰ *Id.* at 741-5. This particular description of the informal bargaining process is most applicable to the large traditional maximum security institutions such as the B.C. Penitentiary where recent disturbances have revealed just how much the surface order is dependent upon deals between inmates and staff negotiated upon the threat of violence. At a more open medium security institution such as Matsqui the negotiation trades less upon this threat than the promise of the fruits of the system such as temporary absence passes and recommendations for parole.

¹⁸¹ *Id.* at 752-3.

would seriously compromise institutional order, Reich suggests that it would in fact enhance it.

Formal bargaining may undermine the violent inmate leadership fostered by private bargaining. The most powerful inmates, capable of controlling, bribing and directing others, will have a lesser amount of custodial largesse to dispense when that largesse is formally and more uniformly doled out . . .

. . . Formal bargaining may also provide inmates with a legitimate and responsive channel for expressing grievances and demands.

. . . The closed and repressive inmate society created in part by private bargaining prevents open communication of grievances. Formal bargaining on the other hand may provide inmates with a channel for airing grievances and gaining official response. It may thus give the institution a kind of safety valve for peaceful rather than violent change. Furthermore, the atmosphere of suspicion and distrust and the sense of injustice among inmates occasioned by private bargaining may be substantially reduced when the bargain is formalized.¹⁸²

The concept of bargaining is particularly important when we consider one reality of prison which does not conform to one of the premises of the Family Model. When talking of these premises, a query was raised concerning abuse of power and whether such abuse could be regarded as an aberrant fact rather than something endemic to the prison community. What formal bargaining can accomplish is a redistribution of power between the administration and inmates along mutually accepted lines, and such redistribution may provide an alternative check on the abuse of power to that of legal due process standards imposed upon the exercise of power which is solely in the hands of the administration. Indeed for those problem areas where bargaining is an appropriate model (and this will be discussed later) it is submitted that it may be a more effective check than a system which, rather than proceeding upon mutually agreed standards, proceeds upon standards imposed upon the prison administration from outside. The bargaining model also has additional strengths not possessed by the due process model. Not only can it ensure fairness and control discretion, but it can also provide a framework for men in prison to participate in the shaping of the rules which govern their lives, a participation which not only confers dignity on the men but legitimizes the rules.

To what extent is the Family Model and the concept of bargaining already recognized at Matsqui? Earlier on I described the process of early lockup whereby a guard can require an inmate to go to his cell and forfeit his evening recreation for violation of an institutional rule. While this can be readily equated with a Family Model of discipline the reaction of inmates to its administration shows that the model is based on the relationship of parent and small child. Inmates rightly object to being cast in the role of a small child in relation to an omniscient, omnipotent guard/parent and this affirms a point made before, that when talking of a Family Model we do not mean replicating the pure family form. The lockup procedure in fact not only illustrates the limitations of a pure Family Model but also the danger of a Family Model divorced from bargaining. As administered during the period of this research there was little possibility of negotiations between the guard and the inmates regarding lockup. Under the lockup procedure,

¹⁸² *Id.* at 754-757.

power was clearly all on one side, the side of the guards, and in the absence of any real input by inmates as to the exercise of that power it was left open to guards to exercise it according to their own values and their own view of inmates, which in many cases was that of a small misbehaved child.

A closer approximation to the Family Bargaining Model occurred, albeit on a rather limited basis, in disciplinary cases which were referred by the Superintendent from the Disciplinary Board's docket to counselling groups to be dealt with through the counselling process. This was a true example of redistributing power down from the central administration to the inmates and counsellor and giving the inmates some responsibility for formulating the appropriate response to the alleged violation. Due to the fact that during the four months in which I was in the prison relatively few cases were referred to counselling, it is not possible to talk of any particular policies for referral. It seemed to be left to the particular counsellor to request a referral and only a few counsellors appeared amenable to the process. A description of two of these referrals, however, is illustrative of the potential of this approach and is particularly important in light of the development of the Living Unit concept which, of all recent prison developments, has the closest approximation of the Family Model.

The first case involved an inmate charged with being in possession of contraband. The inmate was newly arrived at Matsqui and during his first visit, a few days after his arrival, had accepted a carton of cigarettes from his visitor. Under the rules this is strictly prohibited. The case was referred to counselling largely through the promptings of the counsellor who suggested that this would be a more appropriate way of dealing with the violation. As a result of the group counselling session a bargain was struck between the inmate and counsellor, which was accepted by the Superintendent, that no further official action would be taken provided the inmate did not commit any further violations of institutional rules for a 90 day period and during that time worked out a satisfactory treatment plan. What is more interesting than the formal bargain however is the informal bargain which the inmates agreed between themselves and the inmate whose violation was under scrutiny. This bargain was that until that inmate had been in the prison a few weeks and had earned enough money to buy himself canteen supplies each of the other inmates would provide him with part of their canteen so that he would not need to receive contraband. This private bargain illustrates the weakness of the structure of the formal bargaining involved in the counselling session. While inmates were given some power in deciding on an appropriate solution and could negotiate about that, there was no question of their negotiating about the rules of the institution which had given rise to the violation — rules which effectively preclude an inmate from having any canteen money until he has worked for a few weeks. What the inmates did informally was to subvert this formal rule. A true formal bargaining procedure would have to be structured in such a way that inmates could question the rules of the institution and make recommendations for their change. Under these circumstances there would be no need for private illicit bargains.

In the second case the inmate was charged with refusing to obey an order. The inmate was a cleaner in the living unit and was assigned to clean

two wings of the twelve wing unit. The officer in charge of the unit ordered him to clean three; he refused to do so and was taken to the special correctional unit and was charged with the offence. At this point the counsellor intervened and arranged a meeting of the men in the charged inmate's counselling group and invited the officer concerned and his superior to attend the meeting. The meeting started in an atmosphere of bitter recrimination by the inmate against the guard for what he regarded as high-handed behaviour in unilaterally changing his workload. The officer explained to the group that this was his first day in charge of the living unit and in looking over what each man had been assigned, he found that each cleaner was doing two tiers on different floors of the unit so that after cleaning one tier the man had to take his materials upstairs and set up afresh. He felt that in any event the two-tier assignment was not enough to keep a man occupied all day and that if he rearranged the work assignments, so that each man cleaned tiers contiguous to each other, they could easily clean three each and he would thereby free some men for other duties. As he explained the reasons behind his order it was clear that from his perspective it was a sensible and reasonable order. The inmates however pointed out that what the officer had failed to consider was the fact that this particular inmate, who was an older man, had been a cleaner for a good while and took special pride in his work and was not like many of the younger men who simply did the minimum work required. This man carefully cleaned up the tier and this was very much appreciated by the other inmates who lived there. To require this inmate to clean three tiers might well compromise his standards.

As the discussions progressed what became very apparent was that what the officer had ignored in formulating his decision was any participation of the inmates in the rearrangement of work assignments. That he would not think to involve them is not surprising since the hierarchy of custody officers is such that his own work assignments are given to him unilaterally without any consultation and it is natural therefore for him to react similarly in the exercise of his own power. A discussion ensued on the importance of workers participating in decisions which affect their lives and the particular importance of involving inmates in work decisions in a prison where they have little other opportunity to exercise control over their lives. The outcome of the meeting was that the custody staff invited the inmates to submit for consideration a detailed schedule of how cleaning assignments should be dealt with, indicating how many tiers and what tiers each man should do. The inmates responded to this with enthusiasm and within 48 hours a new schedule was in operation. This case illustrates in a positive way, as clearly as the previous case did in a negative way, the importance of there being room for negotiation as to the rules of the institution. Without that possibility talking becomes a pointless exercise leading only to a combination of subversion and frustration.

The third development at Matsqui, and potentially the most important in terms of this discussion of the Family Model, is one which goes under the general rubric of the Living Unit Program. This development is not one unique to Matsqui but represents a broad new approach of the Canadian

Penitentiary Service generally. Basically the program involves a new internal structure for institutional decision making, transferring and decentralizing decision making from a central administration to what is called the "Living Unit Team". Thus, decisions involving the awarding of earned remission, grading, recommendations for temporary absences and parole and the handling of minor disciplinary matters are to be within the purview of this team. The team itself is composed of a Living Unit Supervisor and a number of Living Unit officers who work in close liaison with a counsellor. The Living Unit officers are perhaps the most important link in this program since part of their responsibilities is to establish more "active and effective relations with inmates to encourage self-improvement, self-understanding and self-respect."¹⁸³ These officers who are stationed in the "Living Unit" — which is the main cell block at Matsqui — are assigned a small group of inmates with whom they are to deal on a continuing basis. The idea is that they will give advice and help the inmate not only with day to day problems but also with problems relating to release. Since there are many more Living Unit officers than counsellors, this raises the potential for staff-inmate relationships dramatically. Under the program, regular meetings are to be held between inmates and each Living Unit team to deal with specific problems and work towards their solution.¹⁸⁴

There are two major goals behind the Living Unit concept. One goal is to reduce the resentment towards authority. The Living Unit seeks to achieve this by having staff and inmates work together more closely since then

Staff ceases to be guys who always say no and are seen as helpers which helps establish better personal and social relationships between them. Inmates come to accept restrictions because they realize that restrictions have to exist and are not just invented by those in power. This is a very important step towards accepting later the restrictions which society imposes on all of us.¹⁸⁵

The second and what the Penitentiary Service regards as the most important objective is the learning of social skills:

Our most important objective is to help people to find better ways of dealing with social situations: ways that are less impulsive, ways that require planning and consideration of the pros and cons, the consequences of acts, their effects on other people. The staff-inmate group looks at problems at the institution which they decide to solve, or concentrate on a task to be done. Both these activities require that people sit down and analyze a situation; once they know what is really involved, they can now plan for action. How would they go about it? This is where many suggestions are made, some good, some unrealistic. Some suggestions are tried out but fail, and new ways have to be looked at. Then what seems to be the best solution is not found to be applicable in an institutional setting, and some compromise has to be reached about the "next best" solution. . . . True this deals only with institutional situations, but if our residents learn to be less impulsive, to analyse problems and work out solutions, this type of learning can be transferred to outside situations, when they leave.¹⁸⁶

¹⁸³ The Living Unit Program — an information booklet put out by the Canadian Penitentiary Service, dated July 1972.

¹⁸⁴ There is one Team for each of the twelve tiers at Matsqui.

¹⁸⁵ Information Booklet p. 3.

¹⁸⁶ *Id.* at 6-7.

The Living Unit concept clearly has substantial similarities to the Family Model. In seeking to establish better relationships between staff and inmates it hopes to break down the present Battle Model of the prison. In terms of the decentralized decision making and the procedures providing for greater inmate participation in decisions it could permit a bargaining structure to emerge as opposed to the traditional government by fiat. Since the change to the Living Unit program has only recently started in Matsqui, and at the time of writing is still being implemented in terms of delegation of power from central administration to the Living Unit team, it is impossible and indeed would be improper to attempt a detailed assessment of it. However it is proper and necessary to consider whether the concept lacks any features which are necessary to provide a basis for a Family Bargaining Model of dealing with institutional problems, particularly those of institutional law and order, since it is envisaged that certain disciplinary cases will be dealt with by the Living Unit Team and not by the Disciplinary Board.

First, while it is clear that procedures exist under the Living Unit concept for bargaining, it is not clear that the role of negotiation based on reconcilability of interests as a condition precedent has been sufficiently recognized. Thus, inmates at Matsqui have not been informed that through negotiation they can seek a reorganization of institutional life, provided it does not compromise security interests at an unacceptable level, nor has the vitally important area of institutional work been put on any negotiating slate. Rather there is some suggestion that negotiation as to internal institutional problems may have to be "tolerated" in order to develop in inmates a greater motivation to participate in what is seen as basically a resocialization process. Thus to quote from a statement of the Living Unit concept by one of its theoretical exponents:

Motivation is created by a drive to satisfy needs and therefore there must be a need to participate. For this reason it may be that in the initial stages, the problems which the group will be working on will relate to improvement of institutional life. More privileges, "gimmies", represent such immediate gratifications of needs and this could be the level at which group interaction will begin. . . . This stage, it should be emphasized, is not the ultimate one, but may be necessary to a lesser or greater extent to develop involvement in group participation. Once involvement is achieved, the group should progress from trying to make life easier inside to the stage of dealing with problems related to life problems on the outside. The group then considers how to deal with situations pertaining to community adjustment, dealing with people, etc., and is willing to scrutinize the attitudes and abilities of its members in relation to the social requirement. . . . There is a serious danger that the group will remain at the "gimme" stage unless it is prodded to advance to the next ones.¹⁸⁷

It is the writer's submission that, rather than accepting negotiation on matters of institutional life as an unfortunate necessity in order to move on to a discussion of problem-solving on the outside, it would be better to recognize that negotiation, real negotiation, of institutional life is an important endeavour in returning to inmates power over their own lives (and the dignity that gives) and reducing the potential for abuse of power on the part of institutional staff (and the indignity that causes). The fact that the

¹⁸⁷ Statement by Jean Garneau, Ph.D. March 1972.

process of negotiation may have positive benefits in terms of resocialization is an additional and independent goal and one that is not simply an end to which the first goal is a means. The importance of separating the two goals is that there is a risk, if they are confused, not only that negotiation on matters of institutional life will not be given a primary role, but that the institutional staff will come to see the Living Unit concept as *the* major tool in rehabilitation, much the same way as group counselling was viewed in the pre-Living Unit era. The evidence we have to date on the positive effects of counselling in terms of rehabilitation is disappointing and a certain skepticism is in order in relation to the Living Unit Program, since it is basically dealing with learning of skills in the setting of a "Total Institution" and not in the setting of the community. To be sure there may be transferability of skills between the two situations but such transferability into law abiding behaviour is a matter of faith rather than proven facts.¹⁸⁸ The most important tool in seeking to jump the gap between prison and the real world is the temporary absence pass which permits the inmate to prove his skills in the outside community. A danger the writer sees in Matsqui is that with the arrival of the Living Unit concept, there will be a redirection of energy into the prison and away from the community.¹⁸⁹ However, if the Living Unit program is viewed as having the improvement of condition in prison as one of its primary goals, there is much less danger of deflecting energy and attention from those parts of the correctional program which are realistically related to rehabilitation in the outside community.

A second comment on the Living Unit program relates to the attempt to reduce the Battle Model of the prison through the introduction of Living Unit officers. While the role of these officers is defined in terms quite different from that of the traditional guard, the fact is that Living Unit officers have been recruited from men who formerly were guards, and not unnaturally inmates are likely to see the change in title as being just that. Further efforts have been made at Matsqui to reinforce what is regarded by the institution as being more than a semantic change, by having Living Unit

¹⁸⁸ Perhaps the research project which best indicates how skeptical we should be of institutional treatment programs, if rehabilitation is the main criterion for success, is one conducted in Matsqui itself on the effectiveness of a special intensive counselling program. Inmates receiving this special treatment were compared with a control group who did not. The results were that following discharge from the institution the average percentage of time spent in illegal employment by members of the treatment group and their average illegal earnings were much higher than the control group. These results led the researcher to the hypothesis that the special treatment program inadvertently promoted "a well-adjusted, well educated dope-fiend and the greater self-understanding, formal education and greater social skills gained in the superior treatment program were enough to help them to be more successful in the illegitimate world. Murphy, *supra*, note 2. See also *Report of the Treatment Committee of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Queen's Printer, 1972) at 12-13, and J. Robinson and S. Smith, *The Effectiveness of Correctional Programs* (1971) 17 Crime and Del. 67.

¹⁸⁹ This community corrections function of the temporary absence pass has, as a result of recent policy changes, been transferred to the new "temporary parole". This transfer of power from the Penitentiary Service to the Parole Service is, if anything, likely to reinforce the redirection of energy into the prison.

officers wear their ordinary street clothes as opposed to uniforms. However, the effect of this is severely undermined by the fact that Living Unit officers are still required to undertake a security role. Thus, part of their function is to make the count, search inmate cells while they are out of the Living Unit at work, conduct personal frisks and to generally safeguard the security of the Living Unit. It is certainly not easy for an inmate to develop a positive relationship with someone whom he knows regularly searches his personal possessions even though he does it wearing a pastel coloured shirt and flared pants. However, if the Living Unit program were to apply the Family Bargaining Model it is quite possible that a solution to this conflict could be worked out. The institution clearly has an interest in ensuring that inmates do not have contraband on their persons or in their cells. The inmates have an equally clear interest in not being subject to indiscriminate invasion of their personal security and privacy. Since searching procedures have usually been developed only with security interests in mind it is quite possible that a mutually acceptable procedure could be worked out which accommodates both security and privacy interests. Also as part of such negotiating the very definition of "contraband" would come under scrutiny, and if this led to a narrowing of what is "contraband", that is, more liberal rules relating to what inmates may have in their cells, it would in turn reduce the need for the present pattern of searching.¹⁹⁰

The most important role of the Living Unit, in terms of the focus of this study, is that minor disciplinary matters are to be handled through the Living Unit team rather than by the Disciplinary Board. Divisional Instructions provide that

An Adjustment Committee shall be established in each Living Unit to deal with adjustment problems and minor disciplinary infractions for which it has been delegated authority. This Committee shall be chaired by the Living Unit Supervisor who shall appoint other members, totalling not more than three in number.¹⁹¹

As yet there have been no further guidelines issued as to how this Committee is to operate. While this is understandable since the Living Unit program is meant to be flexible, permitting variation from institution to institution, in the absence of guidelines, it is likely and perhaps inevitable that the Adjustment Committees will rely on the only models they have experience with in discharging this disciplinary function. The Committees would then become simply scaled down Disciplinary Boards, the only differences being that they will be more decentralised and will have, because of that, greater personal knowledge of the inmates coming before them. If this occurs, they are likely to magnify the present deficiencies of the model from which they have been derived, particularly that of pre-judgement by familiarity.

This pull of past practice in handling discipline is already illustrated at Matsqui by the continuation under the Living Unit program of the early

¹⁹⁰ For an excellent analysis of the potential for reconciliation of the competing interests involved in prison searches see R. Singer, *Privacy, Autonomy and Dignity in the Prison, A Preliminary Enquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons* (1972) 21 Buff. L. Rev. 669.

¹⁹¹ D. I. 327.02 para. 5.

lock up sanction. This is still administered by individual officers albeit in their capacity as Living Unit officers rather than guards. At this level the change is purely semantic. However there is the potential for real change: since Living Unit officers are not rotated throughout the institution, as are guards, but are assigned to work exclusively in the Living Unit, and there are now opportunities both through closer conduct with inmates and the weekly meetings to question and challenge their actions, Living Unit officers should become increasingly accountable to inmates for the exercise of their power.

It is suggested that to ensure such accountability and to avoid the negative effects of the Adjustment Committees mimicking the Disciplinary Board, guidelines should be given for the handling of minor disciplinary matters which are based on the core features of the Family Bargaining Model. These should permit inmates to negotiate with their Living Unit team to determine a mutually agreeable procedure for handling disciplinary matters based upon the explicit need to reconcile their interests. There are a variety of models which could be suggested. For example, offences might be dealt with by a committee of the whole, that is, all inmates on a tier and the Living Unit team. Alternatively, inmates could appoint one of their number to sit with the Living Unit team on a revolving basis. Under either model the whole group could agree to a tariff of penalties to be awarded for various categories of offence and could permit variations from the tariff depending on the value the group placed on uniformity of sentencing as opposed to individualization. They could also agree on whether penalties such as early lock up should be part of that tariff. Whatever model was decided upon, under the bargaining model it is vital that the participants in the process are made aware that critical scrutiny of the institutional rules they are enforcing is permissible and indeed desirable if the legitimacy of the institutional rules and the disciplinary process is to be recognized.¹⁹²

Part VI A Duel System of Prison Justice

It is suggested that the Family Bargaining Model may be a more responsive way of dealing with violations of institutional order and resolving conflict of interests than the traditional Battle Model and be a more effective check on the exercise of institutional power by officials, provided that it deals

¹⁹² While I have developed the concept of formal bargaining within the framework of the Living Unit, it should be mentioned that there are other frameworks for such bargaining which have been used with some success in other prison systems. Thus some inmates have organized along the "democratic union" model (for example in Sweden inmate councils have joined a national organization of ex-prisoners and community groups (KRUM) in broad based negotiations with Sweden's centralized correctional administration. See D. Ward, *Inmate Rights and Prison Reform in Sweden and Denmark* (1972), 63 J.Cr.L. Crim. & Pol. Sc. 240.) There is also a "mediation" model which relies on specially trained third parties possessed of skills necessary to articulate the goals of inmates and correctional administrators so that both groups can understand the other side's priorities and concerns. It would be singularly unfortunate if the Canadian Penitentiary System were to regard the Living Unit, which is an example of a third "problem solving" model, as an exclusive model and thereby deny inmates the right to bargain along other organisational lines if they were dissatisfied with the Living Unit approach.

with problems where reconcilability of interests exists. However in cases where such reconcilability of interests does not exist, and the prime example is the prohibition of drug use, it is better to acknowledge that fact and deal with such disputes using traditional safeguards to ensure that such disputes are fairly adjudicated. It is also suggested that any serious offences, where punishments involving loss of statutory remission, a period of dissociation, or transfer to maximum security are likely to be imposed, should also be dealt with under a due process model. This is not necessarily because disputes here involve interests which are irreconcilable, but rather that until the alternative Family Bargaining Model has been established over a period of time as a viable alternative, it would be dangerous to abandon due process as a check on institutional power where the exercise of that power may take the form of lengthening the term of imprisonment or severely limiting institutional freedom. As a bargaining model develops, transfers could take place between the two models of certain classes of disputes, and this could itself be a product of the bargaining process.

It might seem to some prison administrators that this mixing of two essentially different models of the disciplinary process would produce elements of discontinuity and provide contradictory cues to those within the institution, both staff and inmates. However, it is submitted that at the present time in prison this discontinuity and contradiction exists but is not made explicit. Thus, it will be recalled that the Superintendent's view of disciplinary procedures was to make inmates accept responsibility for their actions and participate in finding an appropriate disposition. He found lawyers' notions of due process unresponsive to this but yet he was required by Directives to operate within the procedural context of such due process. To achieve his own philosophy he modified the procedures but thereby undermined the rules as written and led to the prevailing attitude of inmates that the court was an unfair tribunal. It is submitted that it is far better to recognize that in prison there are inherent contradictions and that the best way to deal with them is to make them explicit and devise procedures which are responsive to them, rather than enact a monolithic process which then operates at one level in the Commissioners Directives and at another level in the Superintendent's Office.

The value of dual models is important not only because it honestly recognizes the inherent contradictions within the prison but permits far greater flexibility within different institutions. In this article I have talked of one federal prison — Matsqui, a medium security institution. If we disregard drug offences, the number of serious infractions against institutional order is relatively low, and therefore it could be anticipated that the bargaining model would become the predominant one. In a maximum security institution, such as the B.C. Penitentiary, where the number of serious violations is likely to be higher, both because of the greater frustration inmates are subjected to and the fact that inmates there are by definition more "desperate", it is likely that the due process model would be the predominant model of adjudication.

Conclusion

If it is possible to draw from this study a single theme that pervades the disciplinary process of the prison in all its aspects, it is the lack of essential fairness. For a process which I have argued is properly viewed as part of the criminal justice system it is a lack which cannot be permitted to endure. The lack of fairness derives from a rule making system which denies men in prison access to and advance notice of the rules which govern their lives, and from an adjudication system which by virtue of the institutional function of the adjudicators (and not through any lack of personal integrity) and the manner of the adjudication cannot help but be biased. It derives from punishment which extends the loss of traditional freedom and seriously limits institutional freedom for conduct which is no offense in the free world proven by procedures to which men in prison alone must submit. It derives from administrative decision-making which on the vaguest of articulated criteria or even no criteria at all permits men to be placed in solitary confinement and to be transferred to a nineteenth century bastille without notice, without a hearing, without reasons.

Prison administrators also are men who have a claim to be treated fairly. They are given the task of working the disciplinary system which, like the larger criminal justice system serves multiple and often conflicting purposes. Through that system they seek to punish, to deter, to rehabilitate, to maintain control, order and security, to promote staff morale and gain inmate respect. To date fair treatment in accomplishing this difficult task has been sought by giving the administrator wide discretion so that like the business manager he can make the most expedient and efficient mix of purposes. Of late this grant of discretion has been further buttressed by the acceptance of the individualised treatment model of corrections.¹⁹³ The price of fairness to the prison administrator has been however injustice to the men in prison.¹⁹⁴ I have attempted to document this and through an analysis of prison disciplinary decisions, in terms of their purposes and their impact on prisoners lives, have suggested substantive and procedural changes which seek to reconcile the legitimate interests of prison administrators and the claims of justice made by prisoners. They cannot always be reconciled and, in these cases, I have preferred the claims of justice to administrative efficiency or the rehabilitative ideal. This is as I feel it should be.

Fairness can be brought to prison decision making in more ways than one. The first way, and the one which appeals to the mind of the lawyer, is through pouring specificity into the criteria for decisions and girding the making of decisions with procedural due process. In this way provided that the process that is "due" is responsive to the particular problems of disciplinary decision making in prison, and I have made suggestions which I

¹⁹³ For the historical development of the individualised treatment model and its dependence on discretion see *Struggle For Justice*, *supra*, note 21. At Matsqui the combination of the prison administrator as manager and therapist is epitomised in the Superintendent who has both a graduate degree in public administration and extensive experience as a counsellor.

¹⁹⁴ By all accounts women fare no better and may even fare worse.

feel are so responsive, the power of the prison administrator over the lives of prisoners may be seen as fairly exercised. The second way to achieve fairness has a different focus. It proceeds on the basis that men in prison will perceive power as fairly exercised when they have participated in the exercise of that power through bargaining with prison administrators as to the rules which govern their lives and the procedures for rule violation. This concept of empowerment, which places power in the hands of the heretofore powerless, seeks to do justice through participation. It does other things as well. It gives men a sense of dignity and a sense of responsibility for their own lives, both values which the prison traditionally has deadened. The concept of empowerment is a difficult one for lawyers to grasp since it is alien to the traditional practice of law. Lawyers are used to helping their clients by exercising the power their training has given them, through incanting the magic words and animating the magic procedures that make up the fabric of the law.¹⁹⁵ The notion of giving up or sharing the magic with the client so that he can be his own Merlin is not seen as the practice of law. Are prison administrators any more likely than lawyers to give up or share their power with their involuntary clients? They have an interest in so doing since empowerment, through the bargaining process, will better achieve correctional goals. Certainly, some lawyers have come to realise that empowering people by giving an understanding of the legal system and of their legal rights may be as effective a way to achieve the goals of their profession as acting in the traditional advocacy role in the "trouble" case.¹⁹⁶ The two models of practice are complementary. So also with the two models I have suggested for the handling of disciplinary decisions in the prison. Through bargaining within a Family Model rules can be devised for prison life which generally are acceptable by the prison community, both staff and prisoners, which will in itself reduce the "trouble" cases. Some trouble cases will of course always remain. The less serious can be dealt with by an adjudication process worked out through negotiation. The more serious cases, particularly those involving violation of rules which are non-negotiable, and in the prison there will always be such rules, require adjudication under the due process model. These are not mere theoretical models but are responsive to the reality of prison life and their acceptance and implementation by the Penitentiary Service will insure that the prison ceases to be what it now is, an outlaw of the criminal justice system.

¹⁹⁵ See S. Wexler, *Practising Law for Poor People* (1970), 79 Yale L. Rev. 1049.

¹⁹⁶ D. Davidson-Moore, *The Vancouver People's Law School* (1972) 31 The Advocate 32. See also J. Douglas, *Organization Ego and the Practice of Alternative Law* (1971) 2 Yale Rev. of Law & Soc. Action 88.

